No. 14,741

IN THE

United States Court of Appeals

For the Ninth Circuit

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Plaintiff-Appellant,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Defendant-Appellee.

APPELLEE'S REPLY BRIEF.

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This is an action brought on November 6, 1952, by the alleged successors in interest of the original payee of a promissory note made in 1932, to recover from the estate of the deceased maker of said note (R. 7) and from defendant individually.

STATEMENT OF THE CASE.

This action is forever barred due to the failure of any holder of the note in suit to file a creditor's claim

in probate within the six months period provided in the California statute. (R. 29, Conclusion I.)

It is admitted no such claim was ever filed. (R. 28, Finding 17, Appellant's Opening Brief, page 9.)

Appellant seeks to escape this absolute bar by alleging that her predecessors in interest were defrauded by the defendant administratrix and thereby prevented from filing a claim in the Edward Cebrian probate proceeding.

This question of fact has been determined adversely to appellant after three years of litigation replete with motions, countermotions, briefs, trial and argument.

The Findings of Fact and Conclusions of Law on this primary issue of fact: the alleged fraud of defendant-appellee dispose of the entire case and find abundant support in the record.

SPECIAL DEFENSES.

In her answer appellee has properly pleaded and relied on the following special defenses (in addition to the defenses based upon the failure to file a claim in probate and the absence of fraud):

1. That the appellant's claim is barred by the provisions of Sections 337(1), 338(4), and 361 of the California Code of Civil Procedure. (R. 19.)

2. That appellant's claim to equitable relief is barred by aggravated and prejudicial laches. (R. 20.)

3. That the promissory note which was payable in Lexington, Kentucky, must be interpreted according

to the laws of Kentucky and in such case the note does not contain any language which constitutes a waiver of the statute of limitations. (Defendant's Reply Memorandum filed in Trial Court, dated April 20, 1954.)

4. Appellant failed to establish title to the promissory note in suit due to the absence of proof of any transfer from Van Meter Terrell Feed Co., a Kentucky corporation, to any other person in the alleged chain of title.

While it is true these rather complex defenses, which involve interesting and intricate conflicts of law questions, were unnecessary to the decision of this case in view of the findings of fact against appellant's claim of fraud, nevertheless they are matters of law and if this Court were of the view no evidence supported the Trial Court's decision, we submit a decision on these special defenses should be made here, avoiding further delay and expense through remand. Therefore Appellee will present her argument upon such special defenses in an appendix to this brief so that this litigation may be terminated without the necessity of further proceedings in the District Court and later appeal.

ARGUMENT.

Edward Cebrian lived in Los Angeles for several years before he died. It appears from the record he registered to vote there, although it also appears from uncontradicted evidence that appellee had no knowl-

edge of her brother's voting in Los Angeles. (Isabelle C. Koch Deposition, page 10, lines 5 to 16, and page 15, line 15; Defendant's Exhibit "B", R. 51; Typewritten Transcript, page 32.)*

Despite the evidence that San Francisco was Edward Cebrian's lifetime home and that he always eventually returned here after his sojourns in other places, appellant advances the bald premise that the fact of Edward Cebrian's legal residence in Los Angeles is established conclusively by the record, and that no finding of residence in San Francisco can be supported.

It may be doubted if so complex a concept as legal residence or domicile involving as it does a mixture of intent and action on the part of the subject can ever be established to the extent that no other finding can be supported.

Certainly that is not the case with a man such as Edward Cebrian, who lived for long intervals in Florida, Kentucky and abroad in Europe, but always maintained his home in San Francisco. (R. 65; Koch Deposition, pages 4-5.)

Appellant in reaching her conclusion falls into one serious fallacy. She avers that only a "floating intent" to return to San Francisco on the part of Edward Cebrian is shown. That begs the question. It assumes

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*The word "letters" at page 32, line 7, of the typewritten transcript, Volume 1, refers to the depositions of Hugh Weldon and Isabelle C. Koch and certain letters referred to in the Weldon deposition. Defendant's Exhibits "A" and "B" respectively. See offer into evidence, page 30, line 6, Typewritten Transcript.

Edward Cebrian did at some time in 1938, or thereabouts *acquire* a Los Angeles domicile. That is the very assumption which the record repudiates.

The fact is that he went unwillingly to Los Angeles. He went there because he was destitute and dependent upon financial aid from his sister, the appellee. (Koch Deposition, page 6, line 20 to page 12, line 18.)

Eventually Edward Cebrian obtained a position as a translator in some government office in Los Angeles. (Koch Deposition, page 4, line 20.)

Efforts were made by Mrs. Koch and her husband to find both employment and lodging for Edward Cebrian in San Francisco, as he had earnestly requested them to do, but to no avail. (Koch Deposition, page 12, lines 3-8, R. 106.)

This evidence discloses, not a surrender of his lifetime San Francisco domicile with a "floating intent" to regain it, but rather that Edward Cebrian never for an instant held the requisite intent to give up his San Francisco residence. He never acquired a legal residence in Los Angeles or elsewhere. He maintained rooms in the Cebrian family home in San Francisco and kept therein various of his personal belongings until 1938, some years after his father died in 1935. (R. 53-56.)

Now what is the significance of this question of where Edward Cebrian had his domicile when he died in June, 1944? The simple fact, upon which appellant's entire case depends for support, is the circumstance that in February, 1945 Isabelle C. Koch exe-

cuted two petitions for letters of administration on her brother's estate. First she filed one in San Francisco and gave the notice of the hearing thereof by mailing and posting to the whole world. (Plaintiff's Exhibit No. 21.) After filing the San Francisco petition, and before the date set for the hearing thereof, a petition for letters of administration was filed in Los Angeles. In that proceeding also notice of the hearing was given as required by the Probate Code. (Plaintiff's Exhibit No. 13.)

To this dual filing appellant seeks to attach the stigma of most vile venality. But the evidence is uncontradicted that Mrs. Koch simply realized that the Edward Cebrian estate had to be probated in the county where he had a legal residence at the time of his death. Therefore, while she believed San Francisco to be the proper county, she knew and appreciated the fact that a court might conclude otherwise on the basis of the Los Angeles habitation. Therefore, she filed the two petitions and submitted the question of residence for decision to the Courts. (Koch Deposition, p. 15.)

Accordingly, on February 26, 1945, Judge T. I. Fitzpatrick, Judge of the Superior Court in San Francisco (where the first petition was filed) heard the evidence in open court and decided that Edward Cebrian was a resident of the City and County of San Francisco, State of California, at the time of his death, and based upon this jurisdictional fact he appointed defendant-appellee the administratrix of the Estate of Edward Cebrian, deceased.

THE FACTS.

We will note first the evidence before the District Court which supports the findings to the effect that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death and not a resident of the County of Los Angeles, where he died. (R. 11, par. VIII; R. 13, par. IX Top; R. 27, par. 15; R. 28, par. 19.)

We preface the quotations from the testimony of appellee's witnesses only with the observation that such testimony shows the earnest desire of Edward Cebrian not to leave San Francisco; not to give up his lifetime home and family ties here, and the reasons why, despite such desires and intent freely expressed, he was compelled against his will to leave San Francisco and go to Los Angeles. Such testimony we submit shows that at no time until death intervened did Edward Cebrian surrender his San Francisco domicile or give up hope of returning to San Francisco.

TESTIMONY OF RALPH CEBRIAN.

"Q. How long have you lived in San Francisco, Mr. Cebrian?

A. Practically all my life.

Q. Are you a brother of Edward Cebrian?

A. Yes, sir.

Q. Where was Edward born?

A. In San Francisco.

Q. Were you also born in San Francisco?

A. Yes, sir, I was."

(R. 52.)

"Q. Is your father deceased?
A. Yes, sir.
Q. When did he pass away?
A. 1935."
(R. 52-53.)

"Q. At the time of his death in 1935, did he own a home in San Francisco?
A. He did.
Q. Where was the home?
A. 1801 Octavia Street.
Q. Were you living in that home at the time of his death?
A. I was.
Q. Did your brother Edward Cebrian maintain an apartment in that home at that time?
A. He did.
Q. Were any of his personal belongings in that home?
A. Yes.
Q. Did they remain there at all times while that home remained in the Cebrian family?
A. Yes, sir.
Q. Will you state to the Court what the extent of his apartment was?
A. He has two rooms, his own rooms on the main floor, and a camera room, we called it. He was very much interested in photography, and a very elaborate camera room with all his lenses, cameras, and so forth—three rooms which were exclusively his.
Q. What happened to the home after your father passed away?
A. He bequeathed the home to me, and I was forced to sell it to satisfy an obligation.

Q. When did you move out of the home?
A. In 1938, March 19th, 1938."
(R. 53-54.)

"Q. Who was actually living in the home at the time your father passed away?
A. Myself, my brother; the two of us.
Q. Which brother are you referring to?
A. My brother Edward.
Q. How long did your brother Edward continue to live in the family home with you?
A. Well, right practically until—in fact, until the day I moved out. He moved out a few days later.
Q. Did he spend some time at the Cuyana Rancho in Santa Barbara County?
A. Yes, sir."
(R. 54.)

"Q. When did you and your brother Edward last meet, Mr. Cebrian?
A. In the fall of 1938.
Q. Where was he staying at that time, or living?
A. At the Palace Hotel.
Q. In San Francisco?
A. San Francisco.
Q. Where did you meet?
A. On First (Bush) Street.
Q. Who was present?
A. Opposite my home, then. I had moved from the residence to a small apartment on Bush Street and he was coming to visit me, and I was just coming home and we talked on the sidewalk.
Q. Who else was present then?
A. Just the two of us.

Q. Will you please tell the Court the conversation you had with your brother Edward at that time?

A. Yes. My brother Edward had come to see me and told me that our sister Isabelle wanted him to move down to Los Angeles.

The Court. His sister Isabelle?

A. Isabelle Koch, and she told him if he moved down there she would do the best to help him live, and so forth, and he came to me to ask me to intercede with my sister and ask her because he wanted to remain in San Francisco. I advised him that I thought the best thing for him to do was to accede to her request and perhaps the family could work it out so he could return to San Francisco.

Q. Did he tell you he wished to remain in San Francisco?

A. Yes, indeed."

(R. 55-56.)

"Q. Where was your brother living at the time you had the conversation with him on Bush Street in 1938?

A. At the Palace Hotel in San Francisco.

Q. Do you recall receiving a communication at your brother's office from your brother Edward Cebrian in Kentucky regarding his registration for the census.

A. Yes, I recall that very plainly. In 1930 he was in Kentucky, and he couldn't be here when the census was being taken, and he wrote a letter to the office asking—saying he would not register in Kentucky but he wanted us to register him in San Francisco.

Q. That was for the census?
A. The census."
(R. 65.)

"A. * * * While he was at the Palace Hotel in San Francisco and was at the home, before I left it—it was an old home, a twenty-room home that had a laundry—he would bring his laundry from the Palace Hotel, his socks, underwear, handkerchiefs, and they were washed on Octavia Street. The Palace Hotel was a dormitory."
(R. 81-82.)

"The Court. Up to and including the sale of the old family home which you maintained, did you keep and maintain the several rooms and photography gallery your brother had maintained prior to his departure?
A. No, those rooms were his, and he had the key to those rooms, and I never interfered with that. When I moved out of the house in March those rooms were locked, and then he came after the rest of the house was vacated and took out his things. I had keys to these rooms, also, and one morning when he was at the Palace Hotel there were some records he wanted in his business and he asked me to bring them up. I opened the door, got the letters he wanted, locked it, and took them back. It was a friendly relation with those rooms, and there was never any discussion with him about those, your Honor."
(R. 85-86.)

TESTIMONY OF ISABELLE C. KOCH.

The reference to the deposition* of Appellee will be referred to as "K.D." followed by the number of the page and the line number.

"Q. Was your brother born in San Francisco, Mrs. Koch?

A. My brother was born in San Francisco."

(K.D. 3, lines 19, 20.)

"Q. Where was the family home, Mrs. Koch?

A. 1801 Octavia Street, San Francisco."

(K.D. 3, line 26 to 4, line 1.)

"Q. Was he employed in Los Angeles prior to his death?

A. Yes, he was.

Q. Do you know by whom?

A. He had a government position as translator.

Q. Where was Edward Cebrian living before he went to Los Angeles?

A. San Francisco.

Q. Did he ever live at the Cuyama Rancho in Santa Barbara County?

A. Oh, yes, he did.

Q. Where did he live before going to the Cuyama Rancho?

A. The Palace Hotel in San Francisco.

Q. And prior to living at the Palace Hotel where did he live?

A. At Octavia Street in the family home.

Q. Did he maintain a room or apartment in the family home on Octavia Street prior to his death?

*This deposition is Defendant's Exhibit "B" but is erroneously referred to as a letter in the typewritten transcript, p. 32.

A. Yes, he did.

Q. That is, as long as it remained in the Cebrian family?

A. That is correct.

Q. Did he keep some of his personal belongings there, his camera equipment and so on?

A. He did. He kept his belongings there, most of them.

Q. Prior to 1935 did your brother make trips outside of California?

A. Yes, he did.

Q. Did he stay in Florida and Kentucky on different occasions?

A. He did.

Q. Did he also go to Europe when he was a boy with his parents?

A. He did. And also while he was living here he went abroad, England, France.

Q. Following these trips to Florida and Kentucky and to Europe did he always return to San Francisco?

A. He did.

Q. And up until he went to live at the Palace Hotel did he always return to the family home at 1801 Octavia?

A. Always."

(K.D. 4, line 18 to 5, line 22.)

"Q. Were you also supporting your brother during and prior to 1938?

A. Yes, I was.

Q. To what extent were you contributing to his support, Mrs. Koch?

A. Well, over $200.00, and then I would send him food and help him with his clothing. That was extra.

Q. Over $200.00 altogether?

A. Per month, at least.

Q. $200.00 per month?

A. Yes.

Q. Did your brother leave the Cuyama Rancho in 1938?

A. Yes, he did.

Q. And where did he go from there, do you know?

A. He came to San Francisco.

Q. Did you ever talk to him as to where he would live, where he would go after he left the Cuyama Rancho?

A. Yes, I did. He wanted to remain here in San Francisco.

Q. When did you talk to him, Mrs. Koch?

A. Well, after leaving the ranch.

Q. In 1938?

A. '38.

Q. And where did you talk to him.

A. At the Fairmont Hotel.

Q. And did you also talk to him on one occasion at the Palace Hotel?

A. Yes, I did.

Q. And both of those occasions—both of those conversations took place in 1938, is that true?

A. That is correct.

Q. Who was present, Mrs. Koch? Was anyone present besides yourself and your brother?

A. No.

Q. What was the discussion you had with your brother in 1938?

A. Well, he wanted to remain here in San Francisco. I could not afford to keep him living the way he had been used to living. All his friends were here. He was greatly entertained and he

would want to entertain to reciprocate, and I just could not afford it.

Q. Did you suggest that he leave San Francisco?

A. I told him, 'Why don't you go down to Los Angeles where you can get to live in a smaller place that won't be so expensive, and try to find a job there?' He couldn't find anything here. So he condescended, much against his will. He did not want to live there.

Q. In that discussion did your brother Edward Cebrian say to you that he had lost the Cuyama Rancho and had lost all hope of ever regaining it?

A. Oh, no. He always had hopes that he would be able to get it back, and I know he had attorneys down south in Los Angeles and in Santa Barbara also trying to get capital to buy it back.

Q. Was this after 1938?

A. Yes.

Q. And did he tell you that he was making these efforts to regain the ranch?

A. Oh, yes. He was very optimistic.

Q. Did he in fact go to Los Angeles following this discussion with you?

A. Yes, he did.

Q. Did you tell him whether or not you would continue to support him if he went to Los Angeles?

A. I told him I would if he would get a reasonable place, that I would do my best to help him as long as I could.

Q. And did you contribute to his support in Los Angeles?

A. I did.

Q. Did he find employment immediately after going down there?

A. No, he did not.

Q. He subsequently acquired the appointment you mentioned of being a translator, is that true?

A. That is correct.

Q. Were there any other brothers or sisters of yourself and your brother in San Francisco in 1938?

A. Yes, my two sisters, my brother Ralph and myself; four of us.

Q. Who were your two sisters?

A. Josephine McCormick and Beatrice de Sanz.

Q. Were they contributing to Edward's support in 1938?

A. No.

Q. Did they contribute to his support at any time after 1938 as long as he lived?

A. No.

Q. Did your brother Edward Cebrian resist the suggestion that he go to Los Angeles?

A. Yes, he did, many times.

Mr. Hoppe. What did he say to you?

Mr. Sooy. Q. What did your brother say to you when you suggested he go to Los Angeles?

A. He did not want to go. He wanted to be around with his family and amongst his friends; he felt he would be lost; he didn't want to go to Los Angeles.

Q. Is that what he said?

A. Time and time again. He would write to me. He would beg me to send him money to come back just for a visit."

(K.D. 6, line 20 to 9, line 22.)

"Q. Did you ever visit him in Los Angeles?

A. Oh, yes, many times. We would go down. My husband and I would go to Los Angeles at least twice a year and we would visit.

Q. During that period between 1938 and 1944, is that correct?

A. Yes.

Q. Where would you visit him, Mrs. Koch?

A. Well, at first he was staying with a friend who had a guest house, and they were all friends, and that amounted to too much money, so I told him to look around for a less expensive place. He was entertained and he had to entertain too, and that was too expensive. So then he found this place—Mrs. Melcher, I think it was, where he died. That was where he was living at the time he died. He died in the hospital, but I mean where he was living at the time of his death, and that was a boarding house and he only had a room with a little kitchenette—very poor quarters and much less expensive.

Q. Did you visit him in both those residences?

A. I did.

Q. Who would be present when you would visit him, Mrs. Koch?

A. My husband.

Q. And your brother and yourself?

A. That's right.

Q. Did you meet Mrs. Melcher?

A. Yes, I did.

Q. Now, were you sending money to Los Angeles during all this period of time?

A. Yes, I was.

Q. Were you paying his rent even during the time that he was employed?

A. Yes, I would send Mrs. Melcher a check.

Q. Did your brother Edward Cebrian ever say anything to you in Los Angeles about where he was living—where he wanted to live?

A. He always—whenever we would see him he would always say, 'Can't you take me back to San Francisco with you?' We always drove and we said no, we couldn't. I just couldn't afford it. But he always wanted to come back, and he wanted to see his brothers and sisters, and he would write to them.

Q. Did he ask you or your husband to find employment for him in San Francisco?

A. Oh, yes, and my husband did try.

Q. Did he ask your husband, Mr. Koch, to find him a place to live?

A. Yes, cheaper lodging, and we did everything we could, but in those days it was very difficult. We couldn't find it.

Q. Did he say whether or not he would be able to live other than at the Palace Hotel?

A. He wouldn't care after being in Los Angeles for a while. He was depressed and didn't like it. He would have lived any place in San Francisco.

Q. Did he ever ask you to send him the fare so that he could return to San Francisco.

A. Yes, he did.

Q. In your discussions with him in Los Angeles, Mrs. Koch, did he speak of San Francisco or Los Angeles as his home?

A. San Francisco always."

(K.D. 10, line 19 to 12, line 18.)

"Q. Did you file a petition for Letters of Administration in connection with your brother Edward's estate, Mrs. Koch?

A. Yes, I did.

Q. Did you file such a petition in San Francisco?

A. Yes, I did.

Q. And did you also file such a petition in Los Angeles?

A. Yes, I did.

Q. Where did you file the first petition? In which county did you file the petition first?

A. In San Francisco.

Q. Do you recall the date that you filed a petition in San Francisco?

A. 1945.

Q. Do you remember the month or the day of the month?

A. February or March—I don't know.

Q. Did you have a hearing on the petition that you filed in San Francisco?

A. Yes, I filed the two petitions, because I did not know what the law would claim would be his residence, and Judge Fitzpatrick said San Francisco because he was born here; he was raised here. He died in Los Angeles, but he was buried in San Francisco. We brought him here. He wanted always to be buried here, and the judge decided; so when that was decided I cancelled the one in Los Angeles.

Q. You have referred to Judge Fitzpatrick. Who is Judge Fitzpatrick?

A. He is a judge in the courts.

Q. Was he the judge before whom your petition was heard?

A. Was heard.

Q. Did you allege in both petitions you filed that your brother died in Los Angeles?

A. Yes.

Q. Did you know at that time whether or not he had voted in Los Angeles?

A. No.

Q. Did you testify before Judge Fitzpatrick whether or not he had voted in Los Angeles?

A. No.

Q. You did testify at the hearing in San Francisco?

A. Yes, I did. My sister was present.

Q. Did you testify that your brother had been staying in Los Angeles prior to his death?

A. Yes.

Q. And that he had died there?

A. That's correct.

Q. Did you also testify that your brother had been born in San Francisco and that San Francisco had always been his home?

A. Yes.

Q. That he had always returned to San Francisco after——

A. Always returned to San Francisco.

Q. Were you appointed in the proceeding in San Francisco before the hearing of your petition in Los Angeles, before the date set for the hearing of your petition in Los Angeles?

A. Yes."

(K.D. 14, line 14 to 16, line 5.)

"Q. Mrs. Koch, was there an allegation or statement in the petition for letters of administration that you filed in San Francisco that was false or untrue?

A. No, I should say not.

Q. Was there any testimony given by you before Judge Fitzpatrick in support of that petition that was false or untrue?

A. No, I should say not.

Q. Did you file either the Los Angeles petition or the San Francisco petition for the purpose of defrauding Edward's creditors?

A. I should say not. We advertised all over, even back east. If there were any creditors they would come direct to me.

Q. Have you ever concealed any of the assets of your brother's estate, Mrs. Koch?

A. No, I have not."

(K.D. 16, lines 12-25.)

"Q. Did you cause a notice to creditors to be published in the San Francisco probate proceeding?

A. I certainly did.

Q. And was that immediately following your appointment in February, 1945?

A. Yes.

Q. Have you administered your brother's estate during all the years since 1945?

A. Yes, I have.

Q. And except for partial distribution that estate is still open, is that correct?

A. That's correct."

(K.D. 17, line 22 to 18, line 4.)

Cross-Examination

"Q. Now, when Edward died down in Los Angeles you of course went down there, did you not?

A. He was ill, and toward the last period he would write to me and say, 'I want you to please have me in San Francisco where my own doctors can see me.'

I didn't realize he was so ill, because if I had I would have had him here and he would have died in San Francisco."

(K.D. 22, lines 6-12.)

"Q. Now, when you went before the Superior Court judge here in San Francisco—what did you say his name was?

A. Judge Fitzpatrick.

Q. Judge Fitzpatrick. What did you tell Judge Fitzpatrick. What did you tell Judge Fitzpatrick about the proceedings you had filed down in Los Angeles?

A. I told him I had filed them in Los Angeles so that the court would decide which was his residence.

Q. Now, what were all of the facts that you told Judge Fitzpatrick to help him reach a decision?

A. That he was born here in San Francisco; he went to school here in San Francisco, and then they went abroad also to school, but his first schooling he started here. When we came back to America he went to Berkeley to the University, and his family home was here; he always wanted to live here; he would take trips as we all did, and he would always come back home, and that this was his home. He was living temporarily in Los Angeles because he was able to find a job in Los Angeles; whereas here he had not been able to find one. So I left it to the court to decide.

Q. And that's the sum and substance of what you told Judge Fitzpatrick?

A. That's about it.

Q. Can you think of anything else that you told him?

A. No at this moment I don't."

(K.D. 24, line 12 to 25, line 8.)

"Q. Why did you not want Edward to have an inexpensive apartment up here such as the one in Los Angeles?

A. There wasn't any available in those days. It was during the war and no apartments were available here such as the one in Los Angeles. We looked around all over.

Q. Were there rooming houses available up here?

A. We couldn't find anything for him, and besides he wanted to live in the same *vein* as he had been living."

(K.D. 28, lines 9-16.)

Redirect Examination

"Mr. Sooy. Q. Mrs. Koch, I show you Defendant's Exhibit 2, purporting to be a photograph of the death certificate of your brother Edward Cebrian, and I ask you whether or not you ever recall seeing the original of that document.

A. I do not.

Q. After your brother passed away and in 1944 did you fill out any blanks giving information as to his death?

A. I don't understand the question.

Q. Did you fill out any blanks for the doctor or the coroner or anyone?

A. No, I did not. My sister attended to everything.

Q. Do you recall talking to the doctor following his death?

A. I never met the doctor.

Q. Do you recall talking to any public official such as the coroner?

A. We ordered the casket, yes, and made the arrangements for his shipping up here.

Q. Did you order the casket from the coroner or the undertaker?

A. Oh, the undertaker—correction.

Q. Do you recall telling anybody in 1944 in Los Angeles that your brother's permanent home was in Los Angeles?

A. Well, I probably told Mrs. Melcher that, since I was shipping him to San Francisco.

Q. I don't think you understood my question. Did you tell anyone that his permanent home was in Los Angeles at the time?

A. No. I thought you meant in San Francisco.

Q. Do you recall giving anyone information to establish the record of his death?

A. No.

Q. After you filed the petition in Los Angeles of probate of your brother's estate, did you cause notices of hearing in that petition to be mailed to his heirs?

A. Yes.

Q. Do you recall yourself receiving a notice from the Superior Court in Los Angeles telling the date of the hearing?

A. Yes, I do.

Q. Do you recall whether the date of that hearing was in March, 1945?

A. I don't recall.

Q. Did you also cause a notice to be posted in Los Angeles County setting forth the date of the hearing of the Los Angeles petition?

A. Yes."

(K.D. 31, line 1 to 32, line 12.)

TESTIMONY OF EDWIN C. KOCH.

"Q. Do you know where Edward Cebrian went when he left the Cuyama Ranch in the spring?

A. He went to Los Angeles. He was interested in saving the ranch. He went down to interest people in buying it. He was in Santa Barbara, he went to San Francisco. He contacted attorneys to see if he could not save the ranch.

Q. Did he tell you he made those trips for those purposes?

A. Yes, he did.

Q. Did he return to San Francisco in 1938 at all?

A. Yes, he was in San Francisco.

Q. Do you know where he stayed here?

A. I believe it was at the Palace Hotel.

Q. Did you come to San Francisco during that part of 1938 after he had left?

A. Yes, I did.

Q. Where did you see him?

A. I saw him at the Palace Hotel."

(R. 98-99.)

"Q. Did you ever visit Edward Cebrian in Los Angeles between 1938 and the date of his death in 1944?

A. Yes.

Q. On how many occasions, Mr. Koch?

A. I would think perhaps twice a year."

(R. 100.)

"Q. Did he ever write to Mrs. Koch from Los Angeles during that six-year period?

A. Yes, he did.

Q. Did you see and read the letters that he wrote?

A. Yes, I did."

(R. 101.)

"Q. In those letters did your brother ever refer to his being in Los Angeles, his living in Los Angeles?

A. He wrote three or four letters that I remember in which he said that he was unhappy in Los Angeles and wanted to return to San Francisco. At the same time he was asking for more money if he could get it. But he also made it very clear that he wanted to return to San Francisco and make his residence here.

Q. Did he say so in his letters?

A. Yes, he did.

Q. For what purpose did he ask that Mrs. Koch send him funds? Did he specify?

A. For his transportation. He wanted to come up on the bus. He would come up any way that he wanted to. He said that he was not interested at that time in returning to his old habitat, the Palace Hotel, that he would be satisfied living any place that she could find him a room.

The Court. What was that again? He was not satisfied?

The Witness. He was not satisfied—at first Edward Cebrian wanted to stay in San Francisco

and live at the Palace Hotel, and Mrs. Koch did not believe that she was justified in paying his bills and keep in the style to which he had been accustomed. That was the reason she advised him to go to Los Angeles and get away from his friends. He was a man who liked to have big parties. He had a lot of friends here. He objected to that at first. He didn't want to go to Los Angeles. But she was the one who was supporting him, paying his rent, spending money, and he finally went down there, but he always, even after that, he always said he would like to come back to San Francisco, even if he could not live in that style.

The Court. Did Mrs. Koch advance him monies necessary for his current expenses?

A. Yes, she did.

Q. He lived in rather circumspective style in Los Angeles, I assume?

A. No, he had a very nominal rent.

Q. Nominal?

A. Yes, yes, and he was working in Los Angeles as a translator. I do not believe he received much of a salary. However, Mrs. Koch had to augment his expenses.

Q. Did he have any means of support other than the advances which were currently made?

A. None whatsoever, sir, except for a while he was employed in Los Angeles.

Q. As a translator?

A. Yes, sir.

Q. How old was this gentleman when he passed away?

Mr. Sooy. Sixty-two, your Honor."

(R. 102-103.)

"Q. Did you and Mrs. Koch ever drive to Los Angeles between 1938 and 1944?

A. Yes, we did.

Q. Did you ever visit with Edward Cebrian in Los Angeles?

A. We always, every time we went to Los Angeles we visited with him.

Q. Did you ever discuss in Los Angeles with Edward Cebrian the question of his living there?

A. He always wanted to come to San Francisco. He always said that he wanted to make San Francisco his home on every occasion that we were down there, and on one particular occasion we had just come from a little trip and our car was full of our suitcases and he wanted to come back that same day with us, and I told him we didn't have room, we didn't have any accommodations in San Francisco for him. So he actually broke down and cried. He had tears.

Q. And can you tell us when that was?

A. I think that was in 1943. I remember that I had been ill and we thought we would take a few days down south and see if it would help recuperation.

Q. I didn't hear you. Who had been ill?

A. I had been ill.

Q. Mr. Koch, did you and Edward Cebrian ever have a discussion about finding him employment in San Francisco?

A. He asked me to find employment for him and I tried. I asked any number of friends of mine and I also tried to find him living quarters. I went to the Elks Club and I went to Herbert's Hotel for men on Powell Street, two or three different places to see if we could get something

reasonable which was close to what he was paying in Los Angeles.

Q. Were you able to find such accommodations?

A. No, I could not at that time.

Q. During what period of time was that, those conversations?

A. That was in 1943 and 1944 that I tried to find the places.

Q. By the way, on this occasion when you passed through Los Angeles on the return from the trip which you said was in 1943, what was the condition of health of Mr. Edward Cebrian?

A. He was not working that day, and I think the man was really sicker than we anticipated. I thought he was a sort of a baby person. I mean everybody felt sorry for Edward Cebrian. But he was really a sick man.

Q. Did you and Mrs. Koch see him in Los Angeles at any time in 1944 before his death?

A. Yes.

Q. Was he working at that time?

A. Well, not the day that we saw him. I don't remember whether it was on a Saturday or not, but I know he was home that day.

Q. You stated that you tried to find him reasonable quarters in San Francisco. Did he ask you to do so?

A. He asked me that, yes, he did.

Q. Did he ever tell you that he had decided to make Los Angeles his home?

A. Never. He told me many times that he was dissatisfied there, that his friends, most of his friends lived in San Francisco and he would like to be here and he would like to be near his family.

Q. Were any of the other members of the Cebrian family living in Los Angeles during that period of time?

A. No, definitely not."

(R. 105 to 107.)

We submit the foregoing evidence amply supports the finding that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death and in such case, of course, the probate of his estate here was proper. And if San Francisco was the proper county for the probate of the Edward Cebrian estate, it follows that it was not a fraud on creditors for defendant to seek letters of administration here, nor has she been "intermeddling with his estate or the proper probate thereof".

But there is another complete answer and defense to appellant's cause of action on the basic question of fraud.

A FINAL JUDGMENT FINDING THAT EDWARD CEBRIAN DIED A RESIDENT OF SAN FRANCISCO WAS MADE IN 1945 AND IS CONCLUSIVE IN THIS ACTION.

Appellee gave notice of the hearing of her petition for letters of administration in the matter of the Estate of Edward Cebrian, deceased, which she filed in the San Francisco Superior Court for the time and in the manner required by law. After letters of administration were issued to her she has taken all steps required of her as administratrix, such as publishing notice to creditors and the like. (Defendant's Exhibit "C".)

Even if we were to concede, which we do not, that there was no basis for a finding that the residence of Edward Cebrian was in San Francisco, this would not be extrinsic fraud which would have prevented appellant or her predecessors in interest from appearing before the Probate Court and presenting their views.

Estate of Crisler, 83 Cal. App. (2d) 431 at 434, 188 P. 2d 772.

Let us expose the fallacy which infects the very heart of appellant's case.

Following Edward Cebrian's death it was obvious that he was a resident of either San Francisco or Los Angeles. It was for the Probate Court, not appellee, to determine this issue. Accordingly she prepared and filed her petition for letters of administration and filed it in San Francisco. In it she alleged that Edward Cebrian was a resident of the City and County of San Francisco, State of California, and the Court so found when it appointed her administratrix.

Certainly these actions did not constitute fraud in view of the facts regarding (1) Edward Cebrian's long residence in San Francisco, (2) his absence which resulted from and was made necessary solely by his employment and his financial dependence on appellee, (3) his maintaining many of his personal belongings in the Cebrian family home in San Francisco which their father had devised to his brother Ralph Cebrian, so long as Ralph Cebrian owned the home, (4) his statement to his brothers and sisters

that he did not wish to go to Los Angeles, that San Francisco was his home and that he wished to remain here, (5) his requests for financial aid made to his sister, appellee, so he could return to and live at the Palace Hotel, or some other place in San Francisco, and (6) his resistance to the original suggestion he go to Los Angeles. (Defendant's Exhibit "B", and testimony of Edwin Koch and Ralph Cebrian set out herein.)

Thus it must be concluded for the purpose of this action that no fraud, either extrinsic or intrinsic resulted from instituting the pending probate proceeding in San Francisco.

NO CAUSAL RELATION BETWEEN APPELLEE'S ACTS AND APPELLANT'S DEFAULT.

Now to take a step further, let us determine whether appellee did anything to prevent appellant, or her predecessors, from having their day in Court.

After filing her petition for letters in San Francisco and before any hearing thereon, appellee appreciated the fact that the circumstance that Edward Cebrian had lived for several years and died in Los Angeles might cause the San Francisco Probate Court to find that his legal residence was in Los Angeles, rather than San Francisco. Therefore, in order to be prepared for this eventuality and be able to proceed promptly with the administration of Edward Cebrian's estate in Los Angeles, if the San Francisco Superior Court concluded it had no jurisdiction, she

filed a second petition for letters of administration in Los Angeles.

Her allegation in that Los Angeles petition regarding her brother's residence was made before any Court anywhere had determined the fact of residence *and it was made in the form of a bare conclusion.* This must be compared with her factual presentation of Edward Cebrian's San Francisco residence, which is found in her deposition here and which has the backing of a finding of fact made by T. I. Fitzpatrick, Judge of the San Francisco Superior Court, which order is res adjudicata of the matter, as we will show.

Now let us see whether the filing of the Los Angeles petition for letters under the circumstances outlined herein had any effect on appellant or her predecessors, or constituted a fraud upon the Court or their rights.

(I) First of all, it does not appear that it had any effect whatever upon appellant's rights, because neither she, nor her predecessors had knowledge of these matters until after May 20, 1950. (Complaint, paragraph 13, R. 7.)

(II) Appellant, or her predecessors, had *constructive notice* of the pendency of the San Francisco probate proceeding before *constructive notice* of the Los Angeles petition was gained, because the San Francisco notice provided by the Probate Code was necessarily given first, the petition having been filed in San Francisco eleven (11) days earlier than the one in Los Angeles.

Thus, whether it be actual or constructive notice with which we are concerned, neither appellant, nor her predecessors, could possibly have been misled, defrauded or in any way prejudiced by the actions of appellee.

(III) If it be true, as we contend, that appellant would have no right to any relief if the San Francisco probate petition had been the only one filed, let us examine the question whether the filing of the later Los Angeles petition actually constituted any violation of appellant's rights or fraud upon her.

Actually we submit that the very fact that a petition for probate *was* filed in Los Angeles which emanated from San Francisco and bore the name and address of appellee's present attorney and *the names and addresses of all of the heirs at law* of Edward Cebrian, deceased, showed a diligent attempt to have a valid probate administration, as directly opposed to an attempt to conceal the fact that Edward Cebrian had died and left an estate. Of course the appellee abandoned the Los Angeles proceeding when the San Francisco Court determined that it had jurisdiction by reason of Edward Cebrian's residence in San Francisco. The San Francisco Superior Court had *exclusive* jurisdiction to determine that fact of residence, and having done so, the Los Angeles Superior Court would have been powerless to act.

Let us assume in direct opposition to the admitted facts, that appellant and her predecessors had actual knowledge of the filing of the Los Angeles probate proceeding on the day it was filed but never had any

actual knowledge of the San Francisco probate administration. Can any creditor so negligent as to fail to inquire of the petitioner or her counsel why the petition was not heard and further proceedings taken, be excused after seven years of sleeping on her rights? Can any one argue that such a creditor is not much more fully informed and put on notice as to his rights through *actual* notice of such a petition, than if no such petition had ever been filed?

We respectfully submit that not only is there a complete absence of any showing of fraud on the record before this Court, but that the facts admitted by appellant in the complaint conclusively foreclose a finding of fraud on the part of appellee, or any harm therefrom to appellant.

ORDER OF PROBATE COURT IS BINDING HERE.

The fact that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death is not an issue in this case. The elaborate attempts by appellant to "prove" by testimony and exhibits that he was a resident of the City of Los Angeles are ineffective for any purpose.

The reasons for this basic premise are to be found in the provisions of the Probate Code of California and the cases decided by the Supreme Court of the State of California.

> "*Jurisdiction of Proceedings.* Wills must be proved, and letters testamentary or of admin-

istration granted and administration of estates of decedents had, in the superior court:

"(1) Of the county of which the decedent was a resident at the time of his death, wherever he may have died."

Probate Code of California, Section 301.

Residence is an essential jurisdictional fact upon which the power of the Probate Court to administer an estate depends.

Alden v. Superior Court, 186 Cal. 309 at 312, 199 P. 29.

Section 302 of the Probate Code of California provided as follows:

"In the absence of fraud in its procurement, an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked."

Thus when Edward Cebrian died on June 6, 1944 and a petition for the probate of his estate and the issuance to Isabelle C. Koch of letters of administration was granted by the Superior Court of the State of California, in and for the City and County of San Francisco, the question of residence was conclusively determined for all time as against the whole world. There was never a direct attack by appeal or motion and the attempt by appellant here to impeach that order and the finding of decedent's residence in San Francisco in a separate action is a collateral attack.

The San Francisco Superior Court was fully advised by verified petition that the decedent had died in Los Angeles and the factual question as to his legal residence was submitted to the Court and decided. Being a mixed question of law and fact involving the intent of the decedent, it is sometimes most difficult to determine. Physical presence and voting are factors only and not conclusive of the matter, as counsel suggests. But regardless of whether a finding that the decedent was a resident of Los Angeles, and that the San Francisco Probate Court could not administer the estate, might have been entered in 1945 and even sustained on a direct attack as having support in the evidence, the contrary finding having been made, that issue has been determined and that determination is binding here.

The cases on this subject are so numerous and clear that we do not presume to labor the point in argument beyond stating the conclusion they support.

In *Holabird v. Superior Court,* 101 Cal. App. 49, 281 P. 108, a factual situation similar to that presented here is found, except that the attack on the finding of the jurisdictional fact of residence was made in the probate proceeding instead of in a separate action in another Court. The facts in the *Holabird* case were these: One Bessie Ball died and Leo Seibert sought and obtained letters testamentary in Fresno County alleging that Bessie was a resident of Fresno County. Notice of the hearing was given as required by law. Later a sister of the deceased filed a notice of motion in the probate proceeding to re-

voke Seibert's letters and dismiss the probate proceeding. Her motion was made on the ground that Bessie was a resident of Los Angeles and that the Fresno Court, therefore, lacked jurisdiction to admit the will to probate. Affidavits were filed by the moving party and counter-affidavits were filed by the executor, who had apparently been accused of testifying falsely.

At the time of hearing, however, the executor contended that the Court had no power, authority or jurisdiction to grant said motion, upon the ground that the order granting letters was conclusive upon all persons as to the matters adjudicated in the order and particularly as to the residence of the deceased. The probate court refused to entertain the motion and the sister sought a writ of mandate to compel the Probate Court to hear the matter. The Court's decision is as follows:

> "It is the settled law of this state that an order granting letters of administration is an adjudication of the fact of residence of the deceased in the county over which the court has jurisdiction, and it is binding upon the whole world, unless vacated or set aside on direct attack, for all the purposes of the administration of the estate of the deceased. (*Estate of Relph,* 185 Cal. 605 (198 Pac. 639); *Estate of Dole,* 147 Cal. 188 (81 Pac. 534); *Estate of Latour,* 140 Cal. 414 (73 Pac. 1070, 74 Pac. 441).) While residence is jurisdictional, it is one of those jurisdictional facts which the court must determine from evidence produced before it and when determined, it cannot be attacked collaterally. (*In re Estate of Griffith,* 84 Cal. 107 (23 Pac. 528, 24 Pac. 381).) The Su-

perior Court of a county in which the petition for letters has first been filed has exclusive jurisdiction to determine the question of residence of the decedent, and the courts of other counties must abide by the determination of that court, which is reviewable only upon appeal. (*Estate of Spencer,* 198 Cal. 329 (245 Pac. 176).) Here the court had jurisdiction to hear the proceeding and weigh the evidence and consider its sufficiency to establish the residence of the deceased, and if it erred in that respect, the proper remedy was by appeal within the time allowed by law. As above stated, no claim is here made that any extrinsic fraud was practiced in the procurement of the order and the petition alleges that proper notice was given to all interested parties of the time and place of the hearing, as required by law.

"Under these circumstances, the petitioner is not entitled to the remedy prayed for. The petition is therefore denied."

(Pages 52-53.)

So here the fact that proof was offered by appellant in support of a contention that the San Francisco Superior Court erroneously determined residence does not confer upon this Court the power or authority to re-adjudicate that issue. It has been conclusively determined and that determination is res adjudicata.

Now since appellant's complete failure to file a claim in the Edward Cebrian estate is based entirely upon the false hue and cry about residence, the whole framework of her case collapses and she stands before

the Court unable to allege or prove the first requirement, to-wit: the presentation of a proper and timely claim in the proceedings for the probate of the Estate of Edward Cebrian, deceased.

In *Estate of Estrem* (1940), 16 Cal. (2d) 563, 107 P. 2d 36, a motion was made under Section 473, Code of Civil Procedure of California, in the probate proceeding to revoke the probate of a will pending in Alameda County and recall the letters testamentary. This motion involved the jurisdictional question whether or not the decedent, who was a non-resident, actually left estate in Alameda County. The issuance of letters, of course, contained the implied finding that she did leave property there. The Court held that that finding was conclusive, saying at page 570:

> "We are of the opinion that section 473 does not permit such an attack upon the original finding of jurisdictional fact by the probate court. The jurisdiction of the court to render a judgment or order often depends upon the preliminary determination of certain jurisdictional facts. When all parties affected are actually or constructively before it with an opportunity to assert their contentions and to appeal from an adverse ruling, the finding of such facts by the court may be reviewed only by an appeal or other timely and available direct attack. This finding cannot be attacked in a proceeding under paragraph 4 of section 473 to have the judgment declared void, nor can it be attacked in any collateral proceeding. In such situations the finding is as conclusive as any other finding of fact by the court in the original proceeding."

Estate of Robinson, 19 Cal. (2d) 534, 121 P. 2d 734, involved a situation similar to that in *Estate of Estrem,* 107 P. 2d 36, supra. The Court said:

> "There is no distinction between the Estrem case and the present case which would justify a refusal to follow the well-settled doctrine of conclusiveness of such an order as is here involved."

The Court went on to make it clear that it is only *extrinsic* fraud which will affect the rule that a finding on a jurisdictional fact is conclusive. (See Section 302, Probate Code, supra.)

A recent probate case involving the finding of residence goes much further than the other cases cited and indeed much farther than is necessary to blow away the appellant's "residence" issue. In *Estate of Crisler,* 83 Cal. App. (2d) 431, 188 P. 2d 772, a petition to probate the decedent's will was filed in Sacramento County alleging she died in Oregon but was a Sacramento resident. The petition was granted and letters testamentary issued. Later a beneficiary sought to revoke the probate on the ground that decedent was a resident of Oregon at the time of her death and that "there was fraud" when the executor alleged and testified that she was a resident of Sacramento County. Affidavits were filed by the beneficiary in support of this motion. The conflict between the executor's proof of residence as Sacramento County and that of the beneficiary was quite obviously not a showing of extrinsic fraud. The Court closes with the following statement, at page 434:

"Finally it may be stated that even though it could be said that Rodolph's testimony was perjured or that he misinformed the court, such acts or statements do not constitute extrinsic fraud but are intrinsic. Extrinsic fraud has been defined as that which has prevented a contestant from presenting his case to the court and does not apply to matter actually presented and considered. (*Zaremba v. Woods,* 17 Cal. 2d 309 (61 P. 2d 976); *O. A. Graybeal Co. v. Cook,* 16 Cal. App. 2d 231 (60 P. 2d 525); *Hammell v. Britton,* 19 Cal. 2d 72 (119 P. 2d 333); *Estate of Robinson,* supra.) It must be admitted that the facts and circumstances of the present case do not come within such definition.

"The order appealed from is affirmed."

One interesting observation might again be made at this point. Appellant herein appears to have arrived on the scene as owner of the assigned claim sued on here about May, 1950. Appellant's predecessors admittedly learned of both the San Francisco probate proceeding and the Los Angeles petition for letters at or about that time. Therefore, it is obvious that while she charges the direst forms of fraud and misconduct, it is obvious that such acts charged would not have the slightest effect upon her or her course of action or even that of her predecessor's in interest, even if committed as she alleges.

FILING OF SECOND PETITION FOR LETTERS OF ADMINISTRATION IN LOS ANGELES WAS NEITHER INTENDED, NOR DID IT IN FACT CONSTITUTE A FRAUD ON APPELLANT OR HER PREDECESSORS.

The second petition for letters was filed in Los Angeles only because appellee appreciated the fact that the San Francisco Superior Court might find that Edward Cebrian, having lived for a time and died in Los Angeles County, was a resident of that county at the time of his death. In such an event defendant would be able to proceed without delay to seek letters in the southern county. Due to the fact that the San Francisco Superior Court adjudged that Edward Cebrian's residence (domicile) was in San Francisco, it became, of course, unnecessary and in fact *impossible* for her to proceed further in Los Angeles.

In the hundreds of pages of pleadings and briefs which have been prepared and filed in this case, appellant has demonstrated a resourceful and imaginative approach to the law and facts. But in all this mass of words there is not one bit of proof or convincing argument that appellee had any thought, motive or intent when she filed her second petition in Los Angeles, other than as testified by her and set out above. (Defendant's Deposition, Exhibit "B" page 15.)

What would a person who had conceived a design to conceal and hide the probate administration of Edward Cebrian's estate from his creditors have done? Would he have spread on the public records of *two counties,* over his attorney's name and office address, the fact of Edward's death and his desire to be ap-

pointed administrator? Of course not! Appellant contends Los Angeles was the logical place for creditors to make inquiry into Edward's affairs. We submit that for creditors of the antiquity of appellant's alleged predecessors both San Francisco and Santa Barbara Counties would have been more logical choices. There is no evidence any of them were ever in Los Angeles or ever knew Edward Cebrian lived there. But be that as it may, appellee in filing in Los Angeles did the one thing which was the least prudent if she had really had any thought of keeping Edward's creditors off the scent. She gratuitously spread before them the very sign post followed years later by Charles J. Colville, appellant's deceased husband, when he set about looking into Edward's history. It is true there were other sign posts leading to San Francisco, such as an old 1934 bankruptcy proceeding, which Edward Cebrian had filed in Santa Barbara County or farmer-debtor composition.

But by some curious process of reasoning the contention is made that appellee defrauded her brother's creditors by filing the Los Angeles petition, when by not filing it at all, they would all have been deprived of the very avenue of inquiry which appellant subsequently employed.

The fact of the matter is appellee never dreamed in 1945 that Edward Cebrian still owed obligations he might have incurred in the early 1930's in Kentucky. She knew generally he had been in a bankruptcy proceeding in 1935, but had and has a most imperfect understanding of the nature of that proceeding, ex-

cept that when it was all over in 1938 Edward Cebrian had lost the Cuyama Rancho.

Fraud to be actionable must, of course, have had some effect upon the rights of the person who claims to be defrauded. We assume then, solely for the purpose of argument, that a finding of fraud, either intended or unintended, actual or constructive, intrinsic or extrinsic, could be supported by the evidence in this case. Even so, appellant must still plead and prove that the filing of the Los Angeles petition prevented her, or her predecessors, from filing a probate claim before August 27, 1945, when the time for filing claims expired. We submit there is neither pleading, proof or inference deducible from proof that the various alleged predecessors of appellant and her husband, who apparently all lived and died in Kentucky, ever heard of appellee or her two petitions, must less were defrauded thereby.

While it might be conceded that the filing in Los Angeles involved time and expense not justified by the saving of a few days, it certainly did not possess the venality to draw forth the consequences appellant seeks to vest it with.

WAS ALLEGED FRAUD INTRINSIC OR EXTRINSIC?

Further study of this question convinces us that this question of law can be divided into two parts for clearer study.

(A) Was the preparation and filing of a petition for probate in San Francisco Superior Court a fraud

upon the rights of appellant or her predecessors, assuming no second petition had ever been filed in Los Angeles.

We doubt if the question of where a wanderer resides and has his permanent domicile is ever so obvious *prior to a determination by a court,* that it can be fraudulent for a relative to make an allegation as to such person's legal domicile in sincere accord with the affiant's belief. And no one can read all of appellee's deposition and doubt that *in her mind,* both in 1945 and now, she believes Edward Cebrian's permanent home was in San Francisco all of his life.

Yet appellant contends that voting (which appellee did not know about in 1945) and physical presence with some possessions is so *conclusive* as to Edward Cebrian's Los Angeles residence that it was active fraud for appellee even to allege otherwise.

The final order made in San Francisco Superior Court on February 26, 1945, appointing appellee administratrix was a conclusive determination of the jurisdiction of the Court, including the residence of Edward Cebrian in San Francisco.

Section 302, Probate Code of California.

The statute is prefaced by the clause "In the absence of fraud in its procurement". It has been settled in California that the "fraud" referred to in that section is "extrinsic", and not intrinsic fraud.

Estate of Robinson, 19 Cal. (2d) 534 at 539, 121 P. 2d 734.

Except for being a much stronger case, we submit the facts of the *Crisler* case cited above demonstrate

that any action by appellee could not possibly constitute "extrinsic" fraud. No act by her prevented appellant, or her predecessors, from appearing and filing their alleged claims within the time allowed by law. No such cause and effect relation between their failure and her acts has been shown. Under the law no such connection *can* be shown.

In re Griffith (1890), 84 Cal. 107 at 112-113, 24 P. 381, was another probate matter in which one Gambetta was alleged to have sought letters of administration in San Joaquin County, knowing the decedent was a resident of Alameda County, and knowing also that his name appeared in the great register of Alameda County, all without disclosure to the Probate Court. The Court held this question of fraud alleged to have been committed was not extrinsic or collateral, but pertained to the precise matter before the Court: the residence of the deceased. The decision is based upon the United States Supreme Court case of *U.S. v. Throckmorton,* 98 U.S. 61, which it quotes as follows:

> " 'The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in a matter upon which the decree was rendered.' The principle laid down in this case is in accordance with the weight of authority, and is required by far-reaching considerations of public policy."

To the same effect is *Holabird v. Superior Court,* 101 Cal. App. 49 at 52-53 (281 P. 108), quoted and discussed above.

EXTRINSIC FRAUD.

One of the leading cases in California dealing with the distinction between extrinsic and intrinsic fraud is *Pico v. Cohn* (1891), 91 Cal. 129, 25 P. 970, 27 P. 537. There one Pico sought to set aside a former judgment which Cohn had obtained against him. It was subsequently discovered that this judgment was obtained largely because Cohn had bribed one Johnson, an eye witness. The fraud of Cohn suborning perjury was held to be intrinsic and the judgment, having become final, the demurrer to the suit in equity to set it aside was sustained. The discussion of this point is found beginning at page 133 of 91 Cal. We refrain from selective quotation in order not to spoil the continuity of the Court's reasoning.

But from the *Pico* case and many subsequent cases we can, by example, determine what does constitute extrinsic fraud which entitles the party defrauded to be relieved from a decree so obtained.

(A) Keeping an unsuccessful party away from the Court by a false promise of compromise.

(B) Keeping a party in ignorance of a suit.

(C) Where an attorney fraudulently pretends to represent a party, but connives in his defeat.

Baker v. O'Riordon, 65 Cal. 368, 4 P. 232.

(D) Where an attorney fraudulently sells out his client's interest.

(E) Where false affidavits of service of summons or citation are made, no service being made.

Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

(F) Where a person *knowingly* omits the names of heirs at law from a *petition for probate* of a will, so that they receive no notice, as required by law.

Zaremba v. Woods (1936), 17 Cal. App. 2d 309, 61 P. 2d 976;

Probate Code of California, Sections 326, 328.

But see

Mulcahey v. Dow (1900), 131 Cal. 73, 63 P. 158, and

Lynch v. Rooney (1896), 112 Cal. 279, 44 P. 565, where omitted heirs are held barred by the *decree of distribution.*

(G) Where the party guilty of fraud so misrepresented facts as to prevent the victim from discovering the earlier fraudulent acts which were the basis of the cause of action.

Caldwell v. Taylor (1933), 218 Cal. 471, 23 P. 2d 758, 88 A.L.R. 1194.

(H) Where a personal representative of a decedent wilfully suppresses material facts in bad faith for the purpose of preventing creditors from enforcing their rights.

See

Bankers Trust Co. v. Patton (1934), 1 Cal. 2d 172, 33 P. 2d 1019.

Bad faith is an essential element in any suit to charge a defendant with guilt for fraudulent acts or omission.

(I) Where a plaintiff had a defense and counterclaim but relied on the defendant's representation that

if she did not defend he would hold the property in trust for her.

Flood v. Templeton, 152 Cal. 148, 92 P. 78.

The quotation of general language and even definitions on the question of whether an established fraud is extrinsic or intrinsic is of little help without a careful study of the facts of each case.

There are some factors which can be distilled from the cases which aid in the determination.

1. The party charged with the fraud must have wilfully and in bad faith performed some act or failed to perform some duty imposed upon him by law, which prevented some person affected by the judgment or order from having his or her day in Court.

Bankers Trust Co. v. Patton (1934), 1 Cal. 2d 172, 33 P. 2d 1019;

Caldwell v. Taylor (1933), 218 Cal. 471, 23 P. 2d 758.

Thus in *Sohler v. Sohler* (1902), 135 Cal. 323, 67 P. 282, and in *Campbell v. Campbell* (1907), 152 Cal. 201, 92 P. 184, we have two instances where the party charged with fraud was the mother and natural guardian of minor children who were victimized by her fraud. It was the duty of such mother and natural guardian to represent their interests in the probate proceedings involved, rather than to falsely and fraudulently deprive them of their inheritances at a time when they had no ability or opportunity to defend themselves.

2. The fraudulent act must have been performed for the purpose and with the intent of gaining an

advantage over the party who is deprived of an opportunity to present his case.

In this connection we submit that the evidence disclosed in this case shows with abundant reason why appellee and her counsel believed in 1945 that none of the debts scheduled in Edward Cebrian's 1934 bankruptcy proceeding were still enforceable, as over ten years had elapsed. The statute of limitations, it was reasonable to assume, had long since barred all such claims, if any remained unpaid. The vigorous defense urged here that the note in suit is barred supports this view. Without knowledge or belief that the note in suit or any of the other "so-called" Kentucky debts remained enforceable, it certainly cannot be said appellee formed any fraudulent scheme to keep such claimants in ignorance of their rights.

3. The alleged fraud must, of course, *actually* have been effective to deprive appellant and her predecessors from having their day in Court.

Assuming that only in Los Angeles County could any valid probate of Edward Cebrian's estate occur, as appellant contends and we dispute:

Appellant must show as a minimum requirement to her prayer for equitable relief that solely by reason of the San Francisco filing her predecessor was prevented or hindered from filing his claim in probate.

The absolute absence of evidence on this score is most eloquent. The evidence suggests the contrary conclusion. It appears that the holders of the note in suit were in a state of complete slumber so far as this

asset was concerned from 1938 until Mr. Colville stirred them up in 1950, or thereabouts.

Where then is any basis for relief if, conceding all else, appellant cannot show that the alleged fraudulent acts of appellee did in fact prevent her predecessors from enforcing their rights?

Rather the Court is asked to speculate that *if* the probate proceeding had proceeded in Los Angeles the holder of the note would have been "presumed" to have learned of it in time to file his claim in time. The inference must be drawn that it would have made not the slightest difference to the holder of the note where in California appellee sought administration.

Memory does not serve appellee's counsel as to any creditor of Edward Cebrian who was in the Los Angeles area, either in 1934 or 1945.

Gale v. Witt, 31 Cal. 2d 362, 188 P. 2d 755.
(Alleged false testimony as to witnessing of a will offered for probate.) Since it was one of the material issues decided in the petition for probate, such false allegation was held to constitute intrinsic, not extrinsic fraud, and to afford no relief in equity.

Lynch v. Rooney, 112 Cal. 279, 44 P. 565.
A finding in a decree of distribution as to who was the legal heir is binding and cannot be set aside in a separate suit in equity by other heirs wrongfully omitted. The fraud or mistake was intrinsic.

Mulcahey v. Dow, 131 Cal. 73, 63 P. 158.
Omitted heirs sought in vain to have a widow of their relative declared an involuntary trustee following a

decree of distribution of the relative's estate. It will be noted the omitted heirs lived in other states and had only constructive notice of the proceeding.

In Colville v. Koch it will be remembered that notice of the filing of *both* petitions for probate was given by defendant to the whole world in the only manner recognized by law. She therefore had no duty or opportunity, even if she had known of the note in suit to give the holder any other notice.

5. The party seeking to be relieved from the effect of the judgment or order must demonstrate that his own negligence or laches did not contribute materially to the result.

Appellant's proof reveals a complete absence of any activity on the part of her predecessors regarding the Cebrian note from 1938 until 1950. They apparently did not even bother to communicate with their California counsel during all this time.

Was it not this very failure to do anything whatever to keep in touch with their alleged debtor or inquire as to his assets or whereabouts that accounts for appellant's predecessors in interest failure to file a claim, not any activity appellee is alleged to have engaged in? We emphasize, it is whether the holders of this note were or were not misled or hindered by appellee from filing their claim that is of import here. It matters not whether Cebrian's creditors generally might have known or would have "presumed" that Edward Cebrian's probate proceedings were in Los Angeles.

For all that appears here no holder of the Cebrian note in suit ever knew or heard that Edward Cebrian ever lived in Los Angeles until 1950 or later.

It does not appear that he ever owned real estate in Los Angeles, although the holders of the note knew that he owned land in Santa Barbara, San Luis Obispo and Yolo Counties. All this land was scheduled in his bankruptcy estate.

Appellee feels that the cases, *In re Griffith,* 84 Cal. 107, 24 P. 381; *Estate of Crisler,* 83 Cal. App. 2d 431, 188 P. 2d 772, and *Estate of Robinson,* 19 Cal. 2d 534, 121 P. 2d 734, are so nearly parallel in point of fact as well as principle, that they are controlling here.

We submit:

(i) The alleged acts of appellee, even if fraudulent, had no effect either to prevent appellant's predecessors from appearing to contest the finding as to residence or from filing a probate claim;

(ii) The appellee did no act, and refrained from doing no act, which by law she was bound to do at the time she filed her petition for probate in San Francisco, which in any way hindered, misled, deceived or prevented appellant's predecessors from appearing in the probate proceeding.

Earlier we stated the question of whether the alleged fraud be extrinsic or intrinsic could best be explored under two different factual premises. So far we have discussed at some length the question whether the filing in San Francisco alone was a fraud on appel-

lant's predecessors. Our conclusion is, of course, that it was not.

B. Now we turn to the second proposition: Did the filing of the second Los Angeles petition constitute an extrinsic fraud against the holders of the note in suit?

The very fact that *something* pertaining to Edward Cebrian, setting forth the fact of his death, his habitation in Los Angeles at the time of his death, and the fact that he left estate in California, cannot to our mind indicate a desire to conceal, hide, hinder or mislead creditors of Edward Cebrian. They were certainly no worse off than if no petition had ever been filed there. Appellant's argument that the filing was a carefully contrived blind alley to lead creditors who might examine it to terminate their inquiry is not only not the fact, but not worthy of serious consideration. The Los Angeles petition alleges that Edward Cebrian left an estate. To suggest that a creditor would be so naive as to abandon his claim without so much as a letter to the appellant or her counsel merely because no further papers were filed, is not realistic.

The issue involved is this: it must be shown that some prior owner of the note *did* see the Los Angeles file and was, in *reason,* misled thereby so as to fail to file a claim in the San Francisco proceeding. The absence of any such showing is only too obvious and is fatal to plaintiff's case.

We respectfully submit appellant has not sustained the burden of proof on the fraud issue.

ANALYSIS OF APPELLANT'S ARGUMENT RE: FRAUD.

Appellant avers the law will *presume* a causal relationship between an alleged fraudulent act and some detriment an adversary sustains.

Appellant's Brief, XII, page 20.

The statutory citations there set forth do not even pertain to a presumption of fraud, much less support the contention advanced.

The case of *Beckett v. Selover* (1857), 7 Cal. 215, 237, appears to aid appellant until we find it has been criticized and overruled. It certainly does not now set forth the law of California. In the first place, the *Beckett* case was decided in 1857. By the Act of March 27, 1858 (1858 Statutes, 95) it was provided that the proceedings of Courts of probate shall be construed in the same manner and with like intendments as proceedings of Courts of general jurisdiction, and the records, judgments and decrees of such Probate Courts shall have accorded to them like force and effect and legal presumptions as the orders and decrees of the District Courts.

Secondly, in *Irwin v. Scriber* (1861), 18 Cal. 499, it is said at page 503:

> "The only question presented in this case is, whether it can be collaterally shown against the grant of administration upon an estate made by the Probate Court of one county, that the Court had no jurisdiction, by showing that deceased had not her last place of residence in that county."

The *Beckett* case, cited, quoted and relied on by appellant, was swept aside by the following language from the opinion in the *Irwin* case:

> "It is scarcely disputable that a judgment of the District Court could not be collaterally impeached by showing that the party really was not in the county or served with process; or that a judgment of the United States District Court could be assailed collaterally by proof that the plaintiff was not really a resident of a different State from that of the suit, or not an alien, etc. The same presumptions in favor of the jurisdiction now attach in favor of the Probate Court, as obtain in either of the Courts mentioned. Independently of the statute, it is, to say the least, extremely questionable whether this sort of collateral attack is admissible, although some countenance is given to it by the case of *Beckett v. Selover* (7 Cal. 215). The danger of such a doctrine is forcibly illustrated by Mr. Justice Roosevelt, in *Monell v. Dennison* (17 How. P. 426). He says: 'Where the jurisdiction of a subordinate tribunal, having cognizance of the general subject, has attached by the presentation of a verified *prima facie* case, and by the appearance of the parties, its decision, even on a quasi jurisdictional fact, such as that of inhabitancy, must be conclusive, unless reversed on appeal. To allow it to be called in question collaterally, and on every occasion and during all time, would be destructive of all confidence. No business in particular depending on letters testamentary or of administration could be safely transacted. Payments made to an executor or administrator,

even after judgment, would be no protection. Even if the debtor litigated the precise point, and compelled the executor to establish it by proof, the adjudication would avail him nothing should a subsequent administrator, as in this case, spring up, and after the lapse of a fifth of a century, demand payment a second time, when a scintilla of evidence on one side remained and all on the other had perished. A large number of titles, too, depend for their validity on decrees of foreclosure, and these decrees are often made in suits instituted by executors, or administrator, or their assigns. Must these, too, be subject to be overhauled at any period, however remote, on the nice question of residence?—a question often difficult to decide where the facts are clear, and much more so, of course, where the facts are obscured by lapse of time and loss of documents and witnesses. The doctrine contended for by plaintiff, and indispensable to his success, is, I think, altogether too dangerous for judicial sanction.'"

(Pages 504-505.)

The language also has particular application we feel to the facts of Colville v. Koch.

Again, in *Stevenson v. Superior Court* (1882), 62 Cal. 60, at 62, the Court said:

"This case—*Beckett v. Selover*—in so far as the question of the residence of the deceased at the time of death is concerned, was overruled *and we think rightly so,* in the subsequent case of *Irwin v. Scriber,* 18 Cal. 499."

Appellant cites *United States v. Carter* (1910), 217 U.S. 286, 305, 54 L. Ed. 773. In this case an army captain received illicit and secret gains and profits through collusion with contractors in connection with government contracts. The Court found that the officer had in fact defrauded the government, and that his principal, the United States government, had suffered great loss. (54 L. Ed. 773.) A casual study of this case will reveal the complete dissimilarity of facts from Colville v. Koch.

At eight places in her brief appellant cites *Hewitt v. Hewitt,* 17 F. (2d) 716, decided by this Court of Appeals in 1927. This emphasis justifies an analysis of the facts and applicable law. Both the *Hewitt* case and the instant case involve an administratrix and a probate proceeding in California. Both involve diversity of citizenship. But here the similarity ceases.

In the *Hewitt* case the administratrix was the widow of her intestate. She *knew* that he had an adopted son, although she didn't know where he was. As the adopted son (the plaintiff) was an heir of the decedent he had a specific right to notice of the probate proceeding to be given by personal service or mailing under the provisions of Sections 328 and 441 of the Probate Code of California. Furthermore, the petition for the probate of a will must state the names, ages and residences of the heirs, devisees and legatees of the decedent so far as known to the petitioner. (Sections 326 and 440, Probate Code.)

In the *Hewitt* case the widow, or administratrix, knew of the adopted son (plaintiff) and had seen his name in some of the decedent's wills. She did not, however, set forth his name and relationship in her petition for letters of administration (Section 440), and consequently he did not and could not receive the notice of the hearing thereof which the law expressly requires. (Section 441, Probate Code.) It appears further that Mrs. Hewitt at no time notified the Court or her attorney of the fact that there existed an adopted son, who by law was entitled to one-third of his father's estate.

The failure of the defendant-administratrix in the *Hewitt* case to discharge the duty expressly enjoined upon her by law obviously enriched her by increasing her apparent share of the estate and damaged the plaintiff by depriving him of the one-third share to which he was, of course, entitled.

The Court of Appeals made it clear that since plaintiff was actually deprived of his share of the estate by the fraudulent concealment of his identity by the defendant-administratrix he was entitled to a decree as prayed. It was obvious that had the Probate Court known of a third heir it would not have distributed the estate to the defendants.

It was the *plaintiff's* very property which the defendants had received. He had succeeded to it immediately on his father's death by operation of law. (Probate Code, Section 300.)

The classical examples of extrinsic fraud are set forth in the opinion as they are elsewhere in this brief.

Let us compare the actions and legal obligations of the administratrices Hewitt and Koch. Appellant here is, of course, a creditor, not an heir of Edward Cebrian.

Mrs. Koch did not know of the note sued on here, the alleged payee thereof or any subsequent holder when she started the probate of the Edward Cebrian estate ten years ago.

Koch Deposition, page 16, lines 6-11;
Koch Deposition, page 12, lines 19-24.

As administratrix of the Edward Cebrian estate Mrs. Koch was obligated to do two things and only two things with respect to creditors:

(i) She was obligated to give notice to the whole world of the hearing of her petition for letters of administration.

Probate Code, Section 441.

(ii) She was obligated to give *notice to creditors.*
Probate Code, Section 700.

Mrs. Koch fully performed both these duties.
(R. 26, Finding 12; R. 28, Finding 17.)

Neither statute nor reason imposed upon Mrs. Koch the duty of doing more with respect to the creditors of the Edward Cebrian estate, particularly when she had no knowledge or reason to suspect there were outstanding these claims against her brother.

In the absence of any failure to discharge a duty imposed upon her by reason or law, we submit that, even had she known of outstanding obligations, she, as administratrix, was under no legal or moral obligation to solicit claims against the estate and warn creditors of the passage of the time within which claims must be filed.

In the light of the facts of the *Hewitt* case we can well understand the reasoning, and find it entirely consistent with a long line of California cases to the same effect.

Furthermore, we point out that appellant is an alleged holder of an unsecured claim, not the actual owner of the assets held by the appellee, as was the plaintiff in *Hewitt v. Hewitt.* Nor does appellant hold in her own right the assets of the Edward Cebrian estate, since, except for sums distributed on partial distributions, appellee here holds said assets only in her capacity as administratrix.

The recent case of *Wolfsen v. Smyth,* 223 F. 2d 111, also decided by this Court, is relied on by appellant. Again, however, the factual distinctions are not noted. The *Wolfsen* case dealt solely with the deductibility for federal estate tax purposes of a claim which had been allowed by a California Probate Court, even though (like the Colville note) it was clearly barred by the statute of limitations. The administrator who approved the outlawed claim and submitted it to the Probate Court for approval was actually the *creditor,* by virtue of an assignment from

the original payee of the note. The case involved the federal statutes and regulations relating to the deductibility of claims allowed against an estate. The allowance of the barred claim was expressly prohibited by state law (Probate Code, Section 708) and, therefore, of no effect on the issue of deductibility under the Regulations (105 Section 81.30) quoted in the opinion.

As attorneys practicing in California Probate Courts well know, claims are presented for allowance "ex parte". No notice is given, no hearing is necessary. Far different from the hearing on Mrs. Koch's petition for letters of administration of her brother's estate. There notice had been given to the whole world. The case was regularly called in open Court and heard. The testimony was taken down in shorthand. Witnesses were sworn. Matters heard in probate on verified petition, with notice given as required by law, are not, as appellant claims "ex parte". We have none of the factors of wrongdoing and collusion referred to in the *Hewitt, Wolfson* and *Newman* cases. (*Newman v. Commissioner,* 222 F. 2d 131.)

On examination we find the cases *Diamond v. Connolly,* 251 Federal 234, and *Patterson v. Dickinson,* 193 Federal 328, involve situations similar in principle to the *Hewitt* case: that is, the personal representative of a decedent, by fraud, secured the distribution to himself to the detriment of the true heirs. Under well settled rules constructive trusts were imposed on the wrongdoer.

Appellant has also cited the following California cases as support for her position:

Caldwell v. Taylor (1933), 218 Cal. 471, 23 Pac. 2d 758;

Bacon v. Bacon (1907), 150 Cal. 477, 89 Pac. 317;

Campbell v. Campbell (1907), 152 Cal. 201, 92 Pac. 184;

Sohler v. Sohler (1902), 135 Cal. 323, 67 Pac. 282.

Each of these cases, however, we find involve heirs who have been deprived of their rightful inheritance by some fraud practiced by the personal representative of the decedent which prevented the wronged heir from learning of his rights and making timely claim therefor. In other words, as in the *Hewitt* case (17 F. 2d 716) we have situations of extrinsic fraud, absent in the instant case.

> "An analysis of the authorities upon the question of what fraud will warrant the aid of equity indicates that only upon proof of extrinsic and collateral fraud can plaintiff seek and secure equitable relief from the judgment. A showing of fraud practiced in the trial of the original action will not suffice. The authorities hold this to be intrinsic fraud, and uniformly hold that since there must be an end to litigation, and the fraud was part of the case presented in the former action, equity will not reopen the litigation. The leading case of *United States v. Throckmorton,* 98 U.S. 61, 65 (25 L. Ed. 93), so holds."
>
> *Caldwell v. Taylor,* 218 Cal. 471 at 475-476 (23 Pac. 2d 758).

In the absence of such extrinsic fraud it is obvious a final decree of a Probate Court cannot be avoided in equity, regardless of whether we call it a "direct" or a collateral attack. The express well supported finding of the trial judge here was that no fraud, extrinsic in character, with respect to the probate proceedings was committed by the defendant-appellee. (R. 21; R. 30, Conclusion IV.)

Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317, was a case in which there was a mistake which deprived plaintiff of $8,000, since in her actual legacy of $10,000 the "ten" was read as "two" in the original reading of the handwritten will. Plaintiff was not present, however, and in no way negligent or responsible for the mistake. The mistake was made by her husband and other persons having fiduciary responsibilities to her. They profited to the extent she suffered by their mistake. (page 489.) The opinion contains an exhaustive discussion of the law and the well defined distinctions between extrinsic or collateral fraud or mistake for which equity gives relief and intrinsic fraud, for which no such relief through collateral attack is afforded. The Court said at page 483 of 150 Cal.:

> "*Lynch v. Rooney,* 112 Cal. 282 (44 Pac. 565), was an attempt to review a decree of distribution and declare an involuntary trust, upon a showing that the decree was procured by false or mistaken testimony. The case is one of the class where the fraud or mistake is intrinsic. In such cases no relief can be given. (*Pico v. Cohn,* 91 Cal. 133 (25 Am. St. Rep. 150, 25 Pac. 970, 27

Pac. 537); *United States v. Throckmorton,* 98 U.S. 65.)"

One of the most flagrant instances of extrinsic fraud practiced by a fiduciary upon an heir is *Campbell v. Campbell,* 152 Cal. 201, 92 Pac. 184. There the wife of James Campbell was his administratrix and the mother of the minor plaintiffs who lived in Hawaii. They were divested of their rights as heirs in valuable hotel properties in San Jose through wholly fraudulent probate sale proceedings. The mother was not only the fiduciary (administratrix) for all heirs but also the natural guardian of her minor children under obligation to protect their rights. The Court concluded by saying such conduct "clearly constituted under the authorities what is known as extrinsic fraud warranting equitable relief". (152 Cal. 210.)

Another extrinsic fraud case is *Sohler v. Sohler,* 135 Cal. 323, 67 Pac. 282, where, as in the *Campbell* case, minor pretermitted heirs were defrauded by their own mother. The plaintiffs' natural guardian, their mother, while representing them in that capacity wrongfully caused a share of the estate to be distributed to another child of hers who was no relation to the decedent. After stating that the Court could grant plaintiffs relief only if the fraud were extrinsic to the probate distribution, and not if the fraud were intrinsic, the Court said at page 326 of 135 Cal.:

> "But when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. The executrix of the

estate was not alone the trustee of all of the heirs of the estate and of all the parties in interest thereto and thereunder. She was the mother of these minor plaintiffs, had their actual custody and control, and, as their natural guardian, was chargeable with all the high duties pertaining to that relationship. As executrix merely, it might be argued that she was a disinterested party, having no concern whatsoever in the question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But, as the mother and natural guardian of these plaintiffs, her position was a very different one. She was under most solemn obligation to protect the legal rights of her infant and dependent offspring."

These and many similar cases cited do not support appellant's views, notwithstanding the careful selection and quotation of language from the opinions without statement or reference to the factual problem before the Court.

CALEDONIA FARMS—YOLO COUNTY.

The major asset of the Edward Cebrian estate was and is a one-half interest in Caledonia Farms. From the date of his death in 1944 to 1948 this asset was held in trust for the heirs by a stranger to this action, now deceased. (R. 62-3; Defendant's Exhibits D-1, D-2, D-3 and D-4.)

The trustee did not make a conveyance of the legal title to the beneficiaries of the trust until her claims

for advances made for taxes, assessments and operating expenses were paid in 1948. (R. 67.)

Caledonia Farms was listed by Edward Cebrian as an asset in a farmer-debtor proceeding he brought in 1934 under the Bankruptcy Act. (Plaintiff's Exhibit 22; R. 76.)

By some process of reasoning we do not follow, the history of Caledonia Farms was injected into the case and toward the end of the trial much testimony and many exhibits were offered relative to it.

We cannot be drawn away from the issues of this case by false leads, but appellant has devoted several pages of her opening brief to this asset and its history as an "extrinsic factor".

To this we can only observe: (i) There is not a word in plaintiff's complaint about Caledonia Farms. (ii) This appellee did not "conceal" it from creditors or any one else, since she did not and could not obtain legal title to it until she was able in 1948 to pay to the trustee the several thousands of dollars the trustee had advanced from her own funds to pay delinquent and current taxes and other assessments. (iii) Appellee certainly can not be blamed if Hugh Weldon, the Santa Barbara attorney who represented *appellant's predecessor,* failed to properly notify his principal in Kentucky about Edward Cebrian's assets which were listed in the bankruptcy file of which he had knowledge. (R. 76.)

In short, the entire reference to Caledonia Farms is irrelevant. It is ridiculous to say appellee as admin-

istratrix was under a duty to call this asset to the attention of creditors of whom she had no knowledge whatever. (Koch Deposition page 12, lines 19-24.)

This asset, less portions which have been sold, is still in the estate of Edward Cebrian being administered by appellee. Nothing set forth by appellant relative to this land has the slightest bearing upon or causal relation with the failure to file a creditor's claim. Nothing set forth in relation to it gives rise to the slightest inference of fraud on the part of appellee, actual or constructive, intended or otherwise.

APPELLANT AND HER PREDECESSORS HAD CONSTRUCTIVE NOTICE OF SAN FRANCISCO PROBATE PROCEEDINGS.

In asserting plaintiff-appellant did not have constructive notice of the San Francisco probate proceedings she asserts a position untenable under California law. The reverse is established by a long line of California authorities and the point requires no argument.

20 *Cal. Jur.* 2d 76, Sec. 41.

In *Abels v. Frey,* 126 Cal. App. 48, 14 P. 2d 594, the Court said at page 53:

> "The jurisdiction of the probate court is a jurisdiction *in rem,* the *res* being the estate of the decedent which is to be administered and distributed with regard to the rights of creditors, devisees, legatees and all the world. (*Warren v. Ellis,* 39 Cal. App. 542 (179 Pac. 544); *Nicholson v. Leathem,* 28 Cal. App. 597 (153 Pac. 965, 155 Pac. 98).) By giving the notice prescribed by

> the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate, and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appears and presents his claim, or fails to appeal, the action of the court is equally conclusive upon him, 'subject only to be(ing) reversed, set aside, or modified on appeal'. The decree is as binding upon him if he fails to appear and present his claim, as if his claim, after presentation, had been disallowed by the court."

That the statutory notices provided for in the Probate Code of California give constructive notice to all persons, residents of California, and non-residents, was established in *Estate of Davis* (1902), 136 Cal. 590, 69 Pac. 412, where on page 595 the court said:

> "A proceeding relating to the probate of a will is essentially one *in rem,* and a statute providing for a constructive notice by publication or posting gives notice to the world. (*Crall v. Poso Irrigation Dist.,* 87 Cal. 147.) Viewing this matter in the light of constitutional law, it is not necessary that there should be a personal notice served upon any one."

The Court went on to say that the petitioner who was a non-resident of California was notified of the hearing of the probate petition in common with all other interested parties by virtue of the constructive notice given by publication and posting of the notice.

There is an interesting parallel between this *Davis* case (136 Cal. 590, 69 Pac. 412) and the instant case in this: Colville v. Koch started out as a suit to recover the principal and interest due on a promissory note. (See complaint, R. 7.) Now in the intervening years it has undergone a metamorphosis and we now learn it is a suit by a creditor to impose a constructive trust upon the assets of a decedent's estate being administered in probate. (Appellant's Opening Brief 1.)

In *Estate of Davis,* supra, a will contest turned into a proceeding in equity to impress a trust on property under a Decree of Distribution. The Court said at page 597: "Now the metamorphose sought to be made by counsel in the character of his pleading is very great" and refused to permit such a conversion. Five years later the same parties were again urging the same contentions before the California Supreme Court in *Estate of Davis* (1907), 151 Cal. 318 (90 Pac. 711). Again the fact that the non-resident heir was held bound by the posted and published notice of hearing was affirmed.

The federal courts have recognized this California rule as to constructive notice.

Latta v. Western Investment Co., 173 Fed. 2d 99.

We respectfully submit that the findings of fact and conclusions of law to the effect that appellee was not guilty of any conduct which mislead, deceived or defrauded appellant or her predecessors are supported by substantial evidence in the record.

It follows that the failure to file a creditor's claim in the probate proceedings forever bars any action on the note in suit.

The judgment should be affirmed.

Dated, San Francisco, California,
January 3, 1956.

Respectfully submitted,
CHARLES D. SOOY,
Attorney for Defendant-Appellee.

(Appendix Follows.)

Appendix.

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Appendix

The argument which follows in this appendix will concern this Court only in the event it were to decide no substantial evidence supports the findings and conclusions of the District Judge.

We consider here only certain special defenses raised by appellee, aside from the main defenses of failure to file a claim in probate and the lack of fraud on appellee's part.

I.

APPELLANT'S SUIT BARRED MAY 15, 1937.
(Section 337(1), Code of Civil Procedure.)

Any action in California on the note payable in Lexington, Kentucky, on May 15, 1933 was barred four years thereafter, on May 15, 1937, unless the note contains a valid waiver of the statute of limitations. If it does contain such a waiver, other statutes of limitations apply as hereafter noted.

Appellant must concede that if the following language:

> "The makers and endorsers of this note and all parties hereto waive presentment thereof for payment, notice of non-payment, protest and notice of protest and dishonor, and diligence in bringing suit against any and all parties hereto, including makers and endorsers, and all defenses to the payment thereof, * * * ,"

does not constitute a waiver of the statute of limitations under California law, the action was barred by Section 337(1), Code of Civil Procedure of California, long before Edward Cebrian died.

The language does not constitute a waiver of the statute of limitations under Kentucky law and, as we will show, that law is controlling in the matter of interpretation. But the fact is the quoted language does not constitute a waiver of the statute of limitations in any jurisdiction.

In the first place, any one drafting a promissory note who desires to waive the statute of limitations has only to say so in so many words. The note in suit was identical in language with an earlier note made in 1928 in Kentucky, except as to the amount and date of maturity. (Weldon Deposition, page 16, lines 6 to 11; Defendant's Exhibit "A"; Letter dated November 22, 1932 from Hugh Weldon to John S. Barbee. Letter attached to Defendant's Exhibit "A".)

In the second place, the quoted portion will be found to be identical with the language of a form of promissory note used by the appellant's assignor bank in Kentucky. (Defendant's Deposition Exhibit "A" attached to Defendant's Exhibit "A".) Whether or not this explains the source of the language of the note in suit is open to inference. In any event, it appears that it is not unique language but is used in notes payable in the State of Kentucky *where any waiver of the statute of limitations is absolutely void.*

Wright v. Gardner, 98 Ken. 474; 33 S.W. 622.

If we credit Mr. Weldon with authorship of the quoted language of the note we must assume that he, as a California lawyer representing the payee, was competent to include an unambiguous waiver of all statutes of limitations if he had so intended. That he did not believe or intend that the language constituted such a waiver is made apparent by his repeated reference to the fact the statute was running on the note and its predecessors which had the same provision. (Letters attached to Weldon Deposition, Defendant's Exhibit "A".) We believe such contemporaneous declarations by a skilled draftsman are material as probative evidence of the parties' intent to aid in the construction of language which may be ambiguous.

On the other hand, if Mr. Weldon only borrowed the language from the note which was being renewed and we know he did just that, we must credit the creditor in Kentucky, or some agent there, with its authorship. The Kentucky form note referred to almost compels our conclusion that the language in question originated there.

But any waiver of the statute of limitations in Kentucky is absolutely void. (Point II following.)

Therefore, it can not be assumed that the Kentucky draftsman was inserting language of no legal effect. We must attribute meaning to the language, however, if possible. (Section 1641, Civil Code of California.)

And the language quoted has definite meaning when contained in a negotiable instrument. While a payee

has the full statutory period to enforce the obligation evidenced by the note against the maker, he must act very promptly in the event the maker does not pay the obligation at maturity if he wishes to preserve his rights against the endorsers and others only secondarily liable on the note.

Thus only days, not years, are allowed for presentment for payment, notice of dishonor, protest and notice of protest in order to preserve the rights of action against the endorsers.

The meaning of the "waiver of diligence in bringing suit" is most obvious when we consider statutes which require a holder of any note or bond to use all reasonable diligence to recover from the maker (i.e. sue him) under penalty of losing his rights against the endorsers, guarantors and others if he fails to do so.

Thus North Carolina has such a statute and in that state the owner or holder of a note has only thirty days following receipt of notice from an endorser to proceed against the maker.

General Statutes of North Carolina (1953), Vol. 1 C, Chapter 26-7 and 26-9.

See *Taylor v. Bridger* (N.C. 1923), 185 N.C. 85, 116 S.E. 94.

But what is of far more interest here is the Kentucky statute, because we are dealing with a note expressly made payable in Kentucky and the language of which undoubtedly originated there. Thus Section 412.110 of Baldwin's Kentucky Revised Statutes re-

quires a creditor to sue the principal. The statute says in part:

> "If the creditor does not sue to the next term thereafter at which he can obtain judgment, and in good faith prosecute the suit *with reasonable diligence* * * * the co-surety, co-obligor, co-contractor or defendant shall be discharged from all liability. * * * The written notice required in this section shall not be waived unless the waiver is in writing."

Small wonder then that Kentucky notes include a waiver of diligence in bringing suit.

The waiver of diligence contained in the note involved in *Owensboro Savings Bank v. Haynes* (1911), 143 Ky. 534, 136 S.W. 1004, is not verbatim with the language of the note here in suit, but we submit that in legal effect it is identical.

> "In the body of the note sued on is the following agreement: 'The parties hereto, including the makers and indorsers of this note, hereby expressly waive presentment thereof for payment, notice of nonpayment, protest, and notice of protest, and diligence in bringing suit against any party hereto, either maker or indorser.' The rule is that, where the waiver is inserted in the body of the note, it becomes a part of the contract of the indorser, as well as of the maker, and is binding upon the indorser. *Bryant v. Merchants' Bank of Kentucky,* 8 Bush, 43. The question then is: What effect must be given the waiver?"

As to the meaning and purpose of this section the Court said:

"For appellee it is contended that the holder of a note is under no obligation to use diligence as to the maker in order to hold a surety or accommodation indorser liable, and that, therefore, the provision has no reference to such parties. It is also insisted that it is not proper to construe a waiver of the diligence provided by law into a waiver of the statutory right to require the institution of an action. *The language of the waiver is unambiguous. By its terms it applies to an indorser, and to each of the parties to the instrument. One of the things waived is diligence in bringing suit against any party thereto, either the maker or the indorser.* Appellee contends that the waiver itself made him liable at all events, and therefore a surety. He then invokes the statute in question, on the ground that he is a surety. Diligence in bringing suit being the thing waived, it is immaterial whether there is an absence of diligence under the common law, or an absence of diligence after notice given pursuant to the statute. The language is broad enough to include a waiver of diligence, it matters not how the right of diligence may arise. Where a party has contracted away all right to demand diligence in bringing suit, he cannot afterwards give notice under the statute, and insist on that diligence which he has expressly waived. A contract cannot be defeated in this way."

(Pages 1005-1006.)

This case provides the long sought answer to our problem of construction. It must be borne in mind the Kentucky Court was not referring to the statute of limitations which can never be waived there. It

was dealing only with the much more restricted rule of the law merchant that diligence must be exercised where the rights of third parties are involved.

The courts of other states have construed similar waivers. In *Watkins Co. v. Seawright* (1930), 41 Ga. App. 617 (154 S.E. 293), the stipulation was:

> "We the undersigned sureties do hereby waive notice of the acceptance of this agreement and diligence in bringing action against said second party."

The Court held that waiving diligence or promptness in bringing a suit against the principal did not mean acquiescence in the failure to bring any suit at all.

And in *Naylor v. Anderson* (1915), 178 S.W. 620, the note contained this proviso:

> "The makers and endorsers severally waive presentment for payment, protest and notice of protest, and the bringing of suit at the first term of court upon nonpayment of this note after maturity * * * ."

This was held to be a waiver of the defense made available by the statute providing that a surety by notice in writing may require the holder of a contract for the payment of money forthwith to file suit thereon, and that a failure to do so will discharge the surety. The language quoted above simply spells out more precisely what the language in the Cebrian and Owensboro notes (136 S.W. 1004) was intended to accomplish, namely: waive the requirement that suit be brought at once against the maker to preserve the cause of action against any indorsers.

See also *Watkins v. Fricks* (1953), (Ga.) 78 S.E. 2d 2, where the waiver was more specific still and was held valid in Georgia.

The United States Supreme Court in *Sowell v. Federal Reserve Bank* (1924), 69 L. Ed. 1041, considered a note payable in Texas which contained a provision that the maker waived "protest, notice thereof and diligence in collecting". Justice Stone observed that the Negotiable Instrument Law (in effect in Texas) gives effect to such a waiver contained in the body of the note, and that it binds all parties to it.

We feel a study of these cases will reveal the purpose of the language in the note in suit and demonstrate it does not, by intent or accident, create a permanent waiver of the statute of limitations as between the maker and holder.

Finally, as authority for our contention that in no jurisdiction, California included, does the language of the note in suit create a permanent waiver of the statute of limitations, we cite the case of *Kentucky River Coal Co. v. McConkey* (1937), 271 Ky. 261 (111 S.W. (2d) 418). While we rely upon that case and indeed feel that it is controlling by application of the California borrowing statute (Section 361, Code of Civil Procedure, Part II following), in the absence of California cases in point, we feel that it is well reasoned and is entitled to consideration as authority apart from the operation of the borrowing statute.

In the *Kentucky River Coal* case the note contained the provision:

"Endorsers waive demand, protest, and all legal diligence to enforce collection."

The suit was brought against the corporate makers and the endorsers. The endorsers set up the five year Kentucky statute of limitations. As the Court said on page 419 of 111 S.W. 2d:

"We are concerned, therefore, simply with the question of the interpretation to be placed on the words contained in the note on which the suit is based."

The plaintiff contended (as plaintiff contends here) that such language constituted a waiver of the statute of limitations.

In answer to this contention the Court said:

"However, we do not consider the words used to concern the statute of limitations at all. In order to fix the liability of the indorsers, it is ordinarily necessary to make due presentment for payment and to furnish notice of dishonor upon the nonpayment of the instrument in accordance with and at the times required by law. These are matters which may be waived, and, as we interpret the instrument, were all the matters that were waived by the words used. *Liberty Bank & Trust Company v. Hand,* 269 Ky. 342, 107 S.W. (2d) 285. The mere fact that the indorsers waived compliance with the formal steps requisite to fix their liability did not change their characters from parties secondarily liable into makers. The maker is still the party ultimately responsible on the instrument. He could not ask contribution from these claimed co-makers, nor could they thus

procure contribution amongst themselves. The trial court recognized this fact to the extent that he gave judgment to appellee Edwards against his prior indorser, Lisle.

"The case of *Bates' Adm'r. v. Lockery,* supra, is in point. In that case the note contained this provision: 'The sureties, guarantors, and endorsers herein agree to the extension of this note without notice upon payment of interest. The parties to this note generally and severally waive protest and notice of protest.' It was held in that case that the mere acceptance of interest from the principal after maturity without more did not avoid the surety's plea of limitations, and that the words contained in the note did not amount to a waiver of his right to rely thereon.

"there is nothing in the note before us nor in the record from which we can imply a waiver of the statute by appellants. It follows that the trial court erred in failing to sustain the plea of limitations interposed by them, and the judgment against them was improper under the circumstances.

"The judgment is reversed on the original appeal, and affirmed on the cross-appeal."

(111 S.W. (2d) 418 at 420.)

And in *Archenhold v. Smith* (1920) Texas, 218 S.W. 808, the note involved contained this clause:

" 'The makers, sureties, indorsers, and guarantors of this note severally waive presentment for payment, notice of nonpayment, protest, notice of protest, and diligence in bringing suit against any party hereto, and consent that the

time of payment may be extended without notice thereof'."

The entire opinion deals only with the question whether or not the sureties were released due to extensions of time given the maker and because plaintiff-indorsee failed to bring suit at the first or second term of Court as required by Texas statute. It was held they had waived *these requirements.* We cite this case of a very similar note clause to show the exact spirit and meaning of it.

These cases, and particularly the *Kentucky River Coal* case demonstrate, we feel, that the clause in question has a definite purpose, and that purpose is not a general waiver of the statute of limitations, but the far different statutory requirement of diligence in bringing suit against the maker, to hold indorsers liable.

We submit that even if construed by California law, the clause is not a waiver of the statute of limitations. It follows that the shorter four year statute of limitations barred action on this note in 1937. (Section 337 (1), Code of Civil Procedure of California.)

II.

ACTION BARRED EVEN IF IT CONTAINS A PERMANENT WAIVER OF STATUTE OF LIMITATIONS, BY VIRTUE OF CALIFORNIA BORROWING STATUTE. (Section 361, C.C.P.)

The soundness of the point so far discussed by appellee, if accepted by this Court, ends the case in favor

of appellee and all subsequent discussion of law or the facts becomes immaterial.

If the Court finds that the language of the note does constitute a permanent waiver of the statute of limitations, then Section 337(1), Code of Civil Procedure, is not a bar, but Section 361, Code of Civil Procedure, comes into operation and creates a bar to plaintiff's cause of action on the note.

Section 361, Code of Civil Procedure of California, is as follows:

> "Limitation Laws of Other States, Effect of. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."

Charles J. Colville was not the original payee of the note but claims to have purchased it in 1950. (Plaintiff's Exhibit No. 17.)

The cause of action sued on here arose in Kentucky because the note was expressly made payable at 200 Trust Building, Lexington, Kentucky. (Plaintiff's Exhibit No. 1.)

Neither Charles J. Colville, nor his widow Wilma Urch Colville, have been, or now are, citizens of California, either at the time the note matured in 1933 or at any subsequent time. They are citizens of Canada. (Plaintiff's Exhibits 18, 19 and 20, and testimony of Wilma Urch Colville.)

Therefore, it is obvious that on every count the plaintiff and her immediate predecessor were not within the exceptions in Section 361, Code of Civil Procedure.

In matters of procedure, including the application of the statute of limitations, the law of the forum is applied.

The law of the forum, California, applicable to this case is Section 361, Code of Civil Procedure. That statute is a firm and clear declaration of the public policy of this State. It clearly prohibits the prosecution of foreign claims by noncitizens of California which are barred by the laws of the place where the cause of action arose. The cause of action arose May 15, 1933 in Lexington, Kentucky, on which day the note matured.

It is the mandate of the California statute (Sec. 361, C.C.P.) that for the purpose of determining whether the statute of limitations is a defense, the law of California applicable to the note in suit is the statute of limitations of the State of Kentucky.

The Kentucky statute of limitations provides that an action on a promissory note, such as the one sued on here, must be brought within five (5) years from the time the cause of action accrued.

> *Baldwin's Kentucky Revised Statutes,* Sec. 413.120.

Thus the note became outlawed under the lex loci contractu on May 15, 1938.

The language of the note regarding diligence in bringing suit does not affect the running of the Ken-

tucky statute of limitations for two very definite reasons.

In the first place, the language does not constitute a waiver of the statute of limitations.

Kentucky River Coal Co. v. McConkey (1937) (Ken.), 111 S.W. (2d) 418,

cited and discussed under our Part I.

Secondly, even if the language did waive the statute, such a waiver is absolutely void in Kentucky.

Wright v. Gardner, 98 Ken. 474, 33 S.W. 622.

During the hearings on various motions argued and briefed in early 1953 appellant argued with much emphasis that a waiver of the statute of limitations is valid in California. If we can assume, in the absence of any California authority, that the language *does* constitute a waiver, the law of California as to the validity of permanent waivers of the statute of limitations made a part of the note itself, is expressly abrogated by Section 361, Code of Civil Procedure, in the case of notes payable in foreign states and not held at maturity by citizens of California.

It might be noted that since 1951 even California has abolished such permanent waivers of the statute of limitations.

Section 360.5, Code of Civil Procedure of California.

It may well be argued, if it were necessary to do so, that that new enactment (C.C.P. 360.5) cut off any right to sue on the note in suit when it was adopted in 1951, or, at most, allowed only a reasonable time

thereafter to file actions on notes such as the one here involved. However, that statute, amended in 1953, appears not yet to have been cited, according to Shepard.

The validity and interpretation of a contract such as the note in suit is governed by the law of the place where the contract is to be performed, which in the case of a promissory note is the place where it is made payable.

Section 1646, Civil Code of California;

Sullivan v. Shannon, 25 Cal. App. (2d) 422 at 426, 77 P. 2d 498;

11 *Cal. Jur.* (2d), p. 192, Sec. 92, Conflicts of Laws;

Pratt v. Dittmer (1921), 51 Cal. App. 512 at 517, 197 P. 365.

The case just cited involved notes signed in California and made payable in Iowa. The Court said:

> *"The notes were payable in Iowa and are to be interpreted, therefore, under the law of that state."*

The question of law there presented for decision was whether or not an assignee of the notes for value was a bona fide holder, notwithstanding his knowledge that the notes were given as consideration for an executory contract not yet performed.

Conflicts of Laws questions regarding the law to be applied to determine the validity of contracts, including even matters relating to the creation of a valid contract (execution facts) are treated in some detail

by the authors of California Jurisprudence, Second, Volume 11, Conflicts of Laws.

The conclusion there reached is that the better reasoned California cases follow the rule (as compelled by Civil Code Section 1646) that the law of the place of performance governs all matters relating to "execution facts". (See Section 61, pages 143 and 144.)

Even stronger argument for the "place of performance rule" is found in the analysis by Professor Joseph M. Cormack on Conflicts of Laws in 12 Southern California Law Review, pages 335 to 361. On pages 347 to 349 he discusses two California cases directly in point. They are:

Blochman Commercial and Savings Bank v. Ketcham (1919), 36 Cal. App. 284, 171 P. 1084

and

Utah State National Bank v. Smith (1919), 180 Cal. 1, 179 P. 160.

In the *Blochman* case a note was made in Mexico with the place of performance left blank. The holder filled in a California city and the Court ruled he had implied authority to do so. Thus the place of performance being in California, the law of California was applied to determine the validity of the note, citing Civil Code, Section 1646. It was invalid in Mexico but valid in California, so judgment for plaintiff was affirmed.

The *Utah Bank* case involved a note signed and delivered in California but by its terms made payable in Utah. This fact was referred to in the decision in

the District Court of Appeal, 26 Cal. App. Dec. 1195. (See, 12 So. Cal. Law Rev. p. 348.) The Supreme Court (180 Cal. 1) held that the law of Utah governed on the question, whether or not the note was negotiable.

Based upon these and other California cases and, of course, particularly on Section 1646, Civil Code, Professor Cormack concludes that in California "the law of the place of performance governs all contract matters" as opposed to the so called "historic" or "splitting up" rule which employs the law of one state for some purposes and another state for other purposes.

Therefore, we come inescapably to the conclusion that the validity and interpretation of the note in suit and, of course, its component parts, must be determined by Kentucky law. On the score of *validity,* any waiver of the statute of limitations is void by Kentucky law. (*Wright v. Gardner,* supra.) Thus such a waiver in a note payable in Kentucky can not be given effect in California. On the score of *interpretation,* the "diligence" clause does not constitute a waiver of the statute of limitations in Kentucky and thus it can not be so interpreted in a California Court.

But even if the Kentucky law were otherwise as to the *meaning* and *effect* of the clause, the California "borrowing" statute, Section 361, Code of Civil Procedure, borrows not only the five year Kentucky statute of limitations but also the Kentucky law as to the invalidity of the waiver of the statute of limitations.

In other words, the borrowing statute makes not only the Kentucky limitation statute, but all Kentucky law *relating* to the defense of the statute of limitations available to appellee in this case as a defense to appellant's claim. It presents an exception to the general rule that the *lex fori* applies its own law as to all matters of procedure, or it may be said that even in such cases as this it is the lex fori that applies as to the procedural question. This is because in this situation the Kentucky law becomes the law of California applicable to this particular case. But, however the courts may characterize the "borrowing", the result is the same and since the action is barred by Kentucky law, it is barred here.

It will be noted that under the California statute (Section 361, C.C.P.) the place of residence of the defendant-debtor is not a factor to be considered, as it is under statutes of some other states which admit the bar of foreign statutes of limitations.

McKee v. Dodd (1908), 152 Cal. 637, 93 P. 854.

In the *McKee* case a cause of action arose in New York where certain promissory notes were payable. The defendant maker had lived in California for less than the applicable California statute of limitations but had moved on to Hawaii where he died. Plaintiff sued his estate on the notes in California. The action would have been barred if brought in Hawaii but it was not barred in New York where the notes were payable. The Court held that for the purpose of applying Section 361, Code of Civil Procedure, it is the place where the cause of action arose, that is

where the breach (non-payment) occurred that is controlling, not the place of the defendant's residence, nor one or more of the several places where he may have resided. Since the action was barred neither in New York where the notes were payable, nor in California, the lex fori, Section 361 was not a bar in the *McKee* case.

At this point we wish to point out that Kentucky has no counterpart of our California Code of Civil Procedure, Section 351. Therefore, the absence of Edward Cebrian from that state, who was never a resident of Kentucky, during all of the intervening nineteen (19) years, does not toll the Kentucky statute of limitations cited above.

Kentucky does have a statute which tolls their statutes of limitations only in the case of causes of action asserted against *residents* of that state.

> *Baldwin's Kentucky Revised Statutes,* Section 413.190.

Even where the creditor is a resident of Kentucky, the nonresidence of the debtor prevents this statute from tolling the statute of limitations.

> *Selden v. Preston,* 11 Bush 191.

In that early case the Court said at page 198 of Vol. 74, Kentucky Reports:

> "It is a plain legal proposition, applicable to the statute of limitations of this state, that where a cause of action exists in behalf of a resident against a non-resident, the mere fact of the debtor being a non-resident will not prevent the statute from running; and it is only in cases where the debtor is a resident, and absents himself from the

> state by removal or otherwise, that the period of his absence will be omitted in the computation of time."

We have shown that regardless of what construction can be placed on the waiver of diligence in the Cebrian note, any waiver of the statute of limitations in Kentucky is absolutely void.

Now we come to the very heart of this problem. We have developed the fact that appellant's predecessor, Colville, would be met by an absolute bar of the statute of limitations if he had commenced this action on the note in Kentucky.

By the express terms of Section 361, Code of Civil Procedure, the action being barred there, is barred here. This statute is a declaration of the policy of this state.

It has been long settled in California that the defense of the statute of limitations is a defense *on the merits.*

> *Lilly Bracket v. Sonneman* (1910), 157 Cal. 192, 106 P. 715.

In that case a note was given which was payable in Massachusetts. An action on the note was barred by the statute of limitations of the state of Massachusetts but the statute of limitations of California had not run. (Section 351, C.C.P.) Nevertheless, the Court applied the bar of the foreign statute as directed by Section 361, Code of Civil Procedure, and held the action was barred in California.

Of course, if the cause of action is not barred by the law of the place where it arose but is barred in

California, the specific California statute of limitation will be applied and there is no need for the application of Section 361, Code of Civil Procedure.

McMillan v. Douglas Aircraft (1950), 90 Fed. Sup. 670 at 673;

Zellmer v. Acme Brewing Co. (1950), 184 Fed. (2d) 940.

We invite attention to the footnote on page 942 of Volume 184 Federal (2d), pertaining to California Code of Civil Procedure, Section 361, where it is referred to as a "change in the lex fori rule".

In *Allen v. Allen* (1899), 97 Fed. 525, the federal court cites an application of Section 361 made by the California Supreme Court in *Allen v. Allen,* 95 Cal. 184, 30 P. 213.

In *Cope v. Anderson* (1946), 331 U.S. 461, 91 L. E. 1602, the United States Supreme Court was called upon to interpret the "borrowing" statutes of Ohio and Pennsylvania. The suits were brought to enforce the shareholders liability of the Banco Kentucky Company. The causes of action arose in Kentucky where the insolvent bank was and by the Kentucky law the same five year statutory period here involved was applicable. The Ohio statute of limitations is six years, as is Pennsylvania's. The opinion of Justice Black concludes that the "borrowing" statutes of Ohio and Pennsylvania must be applied and, therefore, the five (5) year statute of limitations of Kentucky applied to bar the actions.

Even if Kentucky had a statute which tolled the statute of limitations as to *non-residents,* the case of

Payne v. Kirchwehm, Ohio (1943), 48 N.E. (2d) 224, is direct authority for the proposition that even where the debtor has been absent from the foreign jurisdiction where the cause of action arose, the statute of the forum (which applies the law of the foreign state) is not tolled by such absence from the foreign state. In other words, in our case a Kentucky tolling statute (if there were one) would not toll the statutes of limitations of *both* Kentucky and California merely because the defendant debtor was absent from Kentucky but present in California.

There remains one last point to be determined, to-wit:

Where a waiver of the statute of limitations is contained in a note (which we contend is not the fact here), is the operation of the "borrowing" statute, California Code of Civil Procedure, Section 361, foreclosed? Or, in other words, will an exception be read into Section 361 in a case where the cause of action is not barred here solely by reason of a waiver of the statute of limitations, but is barred in the state where the cause of action arose where no waiver of the statute of limitations is valid.

It is well settled that Section 361 can never apply unless the California statute of limitations has *not* run, and the statute of the foreign state has run.

Western Coal and Mining v. Jones (1946), 27 Cal. (2d) 819 at 829, headnote 9; 167 Pac. 2d 719;

Biewend v. Biewend (1941), 17 Cal. (2d) 108 at 115, 109 Pac. 2d 701.

There is only one purpose to be served by statutes such as Section 361. It is to *shorten* the time within which actions can be brought in this state. Its function is as important and its language equally effective in a situation such as that posed by our question and one in which two different statutory periods are involved; that is, where a shorter period of limitation in a sister state has expired and a longer period provided by our code has not yet run.

The courts in California, so far as we can determine, have made no such exception in the operation of Section 361.

We find that this precise point was raised in a New York case *Anglo California National Bank v. Klein* (1936), 296 N.Y.S. 191. A suit was brought in New York against a stockholder of a California corporation to enforce his stockholder's liability. Defendant pled the statute of limitations. New York has a statute similar to Section 361, which is as follows:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws of a state or country where the cause of action arose, for bringing an action upon such cause of action, except where the cause of action originally accrued in favor of a resident of this state."
>
> Section 13, Civil Practice Act.

In applying this borrowing statute the New York court held that California Code of Civil Procedure, Section 359, barred the action after three years from

the time the liability occurred. This time had *expired.* The New York court went further and *"borrowed"* also the law of California with respect to the validity of the waiver of the statute of limitations. It found and held that the waiver there involved was valid under California law, even though it would not be valid in New York. The court said on page 201 of 296 N.Y.W.

> "Courts, in construing the effect of statutes similar to section 13 of the Civil Practice Act, which borrow the period of limitation of the state where the cause of action arose, *have generally held that the law of that state applies with respect to other matters affecting the running of the period of limitation.* Mechanics' Sav. Bank v. Fidelity Insurance Trust & Safe-Deposit Co. (C.C.) 91 F. 456; Kelmne v. Long, 184 Minn. 97, 237 N.W. 882; see 35 Columbia L. Rev. 762, 770. The courts of this state have applied the law of the state where the cause of action arose to determine the effect of absence of the defendant from the latter state, Hanna v. Stedman, 230 N.Y. 326, 130 N.E. 566; Isenberg v. Rainier, 145 App. Div. 256, 130 N.Y.S. 27; Irving National Bank v. Law (C.C.A.) 10 F.(2d) 721; and to fix the period by which the running of the statute is tolled upon the death of the defendant, Klotz v. Angle, 220 N.Y. 347, 359, 116 N.E. 24. *The purpose of section 13 is to provide that no one can be sued in New York by a non-resident, if at the time he would not be sued in the state where the cause of action arose; if the action is not barred in that state it is not barred in New York so long as it is brought within the time limited by the general statute of limitations of this state.* Isenberg v. Rainier, supra.

"The effect of a waiver of the statute of limitations should, under the circumstances of this case, be determined by the law of the state where the cause of action arose."

Thus we must conclude that this Court should apply California law in this forum (Section 361, C.C.P.) to determine not only whether the statutory period in Kentucky has run (which it has) and also to determine whether or not the provision in the promissory note does constitute a waiver of the statute of limitations in Kentucky and, if so, whether or not it is *valid* in Kentucky. The answer to both latter questions is no.

We submit that appellee, having properly raised the special meritorious defense that Section 361 is an absolute bar to the prosecution of plaintiff's claim in California under the law of California herein outlined, judgment should be in her favor.

III.

PLAINTIFF'S CAUSE OF ACTION BASED ON FRAUD IS BARRED BY SECTION 338(4), C.C.P.

The complaint alleges appellee committed a series of alleged fraudulent acts in February, 1945. This action was commenced November 6, 1952, seven years after the alleged fraud was committed.

A complaint in an action sounding in fraud, which is filed after the expiration of three years from the time the fraud was committed must affirmatively show that plaintiff did not discover the facts constituting

the fraud until within three years prior to commencing the action.

Lady Washington Consolidated Co. v. Wood (1896), 113 Cal. 482, 45 P. 809.

In that case the Court said, pages 486 and 487:

"The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. *It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years.* He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret or were kept concealed; *and he must also show the times and the circumstances*

under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged; and, as the means of knowledge are equivalent to knowledge, *if it appears that the plaintiff had notice of information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, he will be deemed to have had actual knowledge of these facts.* These principles are so fully recognized that mere reference to some of the cases in which they have been enforced will be sufficient. (Martin v. Smith, 1 Dill. 85; Wood v. Carpenter, 101 U.S. 135; Hecht v. Slaney, 72 Cal. 363; Moore v. Boyd, 74 Cal. 167; Lataillade v. Orena, 91 Cal. 565, 25 Am. St. Rep. 219.)."

It is not sufficient merely to allege lack of knowledge of the alleged fraudulent acts beyond the statutory three-year period.

Bradbury v. Higginson (1914), 167 Cal. 553 at 558, 140 P. 254.

Tested by these requirements we find that the plaintiff-appellant's allegation: "13. The plaintiff's predecessors in interest did not learn of the aforementioned acts of fraudulent concealment and intermeddling until after May 20, 1950", is entirely inadequate to bring plaintiff within the exception to the three year fraud statute.

We know that appellant's predecessor Charles J. Colville himself had this knowledge earlier than that date, because as early as 1949 he was prying into the Cebrian estate records. (Defendant's Exhibits "E" and "F".)

There is not even an attempt to plead facts excusing the failure to make an earlier discovery of the fraud relied upon.

This defense does not rest alone on a deficiency in the pleadings. The facts disclosed by the complaint show on its face that the matters which plaintiff claims constitute a fraud *were matters of public record.* Both the petitions for letters of administration filed by Mrs. Koch in 1945 were and are public property. The inquiry which any creditor of ordinary prudence would have launched would have discovered exactly what Mr. Colville discovered. Instead of "concealing" and setting up "false fronts" to mislead creditors, as plaintiff claims, the actions of defendant paved the very way down which Colville travelled.

Thus the two probate files were ready means of knowledge and have been available to plaintiff and all his predecessors for over nine years. Means of knowledge, especially where it consists of public records, as is manifest in this case from the complaint itself, is deemed in law to be knowledge.

Crabbe v. White (1952), 113 Cal. App. (2d) 356 at 360, 248 P. (2d) 193.

For all that appears here, the owners of the note (whoever they were or are) did nothing whatever about the note from 1938 when they corresponded with Hugh Weldon, until 1950, when Colville appeared on the scene and offered to purchase the note. Even though the note was long past due, it does not appear that they even bothered to write again to Hugh Weldon, who had obtained the note for Barbee. This

negligence in failing to take any action is not excused. The most casual inquiry, either in San Francisco or Los Angeles, would have revealed the death of Edward Cebrian. From that point, just as Colville found, the trial was blazed to the San Francisco probate proceedings. The heirs at law were here in substantial numbers. Their counsel has at all times maintained the same office address and telephone number as appears on the Los Angeles petition.

Such negligence, unexplained, prohibits plaintiff from claiming the benefits of the exception to Section 338(4), Code of Civil Procedure of California.

Hobart v. Hobart Est. Co., 26 Cal. (2d) 412 at 437, 159 P. (2d) 958;

Latta v. Western Investment Co., 173 Fed. (2d) 99 (Ninth Circuit).

Having constructive or presumptive knowledge of the filing of both 1945 probate petitions, they had the equivalent of actual knowledge of the very actions they say constitute a fraud.

There have been a number of California cases in which the pendency of probate proceedings have given such constructive notice of the contents thereof that the statutory bar of Section 338(4) C.C.P. was set in motion, even without actual knowledge of the alleged fraud. These cases are :

Coates v. Smith (1949), 95 Cal. App. 2d 20, 212 P. 2d 62;

Bankers Trust Co. v. Patton (1934), 1 Cal. 2d 172, 33 P. 2d 1019;

Gibson v. Rath, 13 Cal. App. 2d 40, 55 P. 2d 1219;

Crabbe v. White, 113 Cal. App. 2d 356, 248 P. 2d 193.

We submit that appellant's pleading and proof are each insufficient to enable her to escape the bar of the Statute of Limitations, Section 338(4), Code of Civil Procedure, under the rules laid down in the California cases cited.

It follows that by reason of the failure to sustain a cause of action based upon the alleged fraud, the failure to file a claim in the probate proceeding is unexcused and bars any subsequent action on the note.

IV.

PREJUDICIAL LACHES APPEARS FROM THE COMPLAINT AND EVIDENCE AND BARS PLAINTIFF'S CLAIM.

Appellant here seeks equitable relief in so far as she seeks to excuse the failure to file a claim in probate through proof of an alleged fraud committed by defendant in 1945.

The evidence shows clearly a long delay after plaintiff's predecessor had actual knowledge of the facts she now sets forth as showing the alleged fraud of defendant.

We pass, for the purpose of argument, the failure to show: (i) any fraudulent representation to appellant or any predecessor in 1945—much less, (ii) any reliance on any such representation, act, omis-

sion or conduct of appellee, and also without any showing of, (iii) injury or damage to appellant or any of her predecessors. We have always understood these requirements were so well established as to be "Hornbook" law. Any allegations in the complaint relative thereto stand as bare conclusions, unsupported by evidence, inference or presumption.

Regarding the defense of laches, however, these are some of the events which have occurred during the twenty-two years since the note in suit matured:

(1) John S. Barbee died.

(2) Edward Cebrian died.

(3) Baylor Van Meter died.

(4) Charles J. Colville died. Mr. Colville alone would have been able to tell us when he first learned of the Los Angeles probate petition.

(5) Josephine McCormick died.

(6) St. John McCormick died.

(7) Correspondence and other papers which passed between Edward Cebrian and Isabelle C. Koch have been destroyed through the years and particularly when she moved her residence in April, 1952, before this action was commenced. (Edwin Koch testimony.)

(8) Edward Cebrian's personal papers and records, if any, pertaining to the note sued on have been lost or destroyed.

The prejudice resulting to defendant from these long delays and the deaths of the principal parties

involved, coupled with the destruction of records, seems too obvious for argument.

V.

APPELLANT'S FAILURE TO ESTABLISH TITLE TO PROMISSORY NOTE IN SUIT.

Appellant has failed to plead a chain of title from John Barbee, the original payee of the promissory note, to herself. By amendment to her complaint made during the trial, appellant now pleads that a Kentucky *corporation,* Van Meter Terrell Feed Co., acquired the note from Barbee. (Complaint, paragraph 3, R. 4 and R. 34.) Appellant claims title from the personal representatives of one Baylor Van Meter. There is not one shred of proof to show that there was ever a transfer of the note from Van Meter Terrell Feed Co. to Baylor Van Meter, nor that he was the sole owner of the corporation.

The issue as to appellant's title to the note was put squarely in issue by the appellee's answer. (Answer, paragraphs 3, 4 and 5, R. 10, paragraph V.)

When an issue of fact as to an assignment of a note is squarely presented, the California Supreme Court held recently that proof of the assignment must be clear. There is no room for speculation.

> *Cockerell v. Title Insurance and Trust Co.,* 42 Cal. 2d 284 at 291-293 (February, 1954), 267 Pac. 2d 16.

Counsel may seek to distinguish this case on the ground that the endorsement there involved was

restrictive, while the note in suit purports to have been endorsed in blank by Barbee, the original payee. The answer, of course, to this contention is that plaintiff has rebutted her own presumption by pleading and introducing proof which indicates the title to the note reposed in the Kentucky corporation from 1932, at least until 1938. (See letter dated April 6, 1938 from Wilson and Harbison, Esqs., of Lexington, and Hugh Weldon, Esq., of Santa Barbara, in 1938, entitled, Re: Van Meter Terrell Feed Co. vs. Edward Cebrian. Defendant's Exhibit "A".)

Having pled intervening ownerships of the note, appellant must complete the chain and prove the transfer of title from the corporation to her predecessor, Baylor Van Meter. Mere production of the note long after maturity does not meet the burden in the face of a denial of plaintiff's title and plaintiff's own attempt to plead and prove the intervening transfers.

In the *Cockerell* case the Court said at page 292 of 42 Cal. 2d, 267 Pac. 2d 16 at 21:

> "The burden of proving an assignment falls upon the party asserting rights thereunder. (*Read v. Buffum,* supra, 79 Cal. 77 (21 P. 555, 12 Am.St.Rep. 131); *Ford v. Bushard,* 116 Cal. 273 (48 P. 119); *Bovard v. Dickenson,* 131 Cal. 162 (63 P. 162); *Nakagawa v. Okamoto,* 164 Cal. 718 (130 P. 707).) In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when that fact is in issue (*Quan Wye v. Chin Lin Hee,* 123 Cal. 185 (55 P. 783)) but

the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee. (*Gustafson v. Stockton etc. R.R. Co.*, 132 Cal. 619 (64 P. 995).)"

VI.

PLACE OF CONTRACTING WAS KENTUCKY.

The evidence indicates the note of Edward Cebrian was signed in California, and mailed to Hugh Weldon in Santa Barbara. (Plaintiff's Exhibit No. 2.)

This note was given in payment of a note made in 1928 by Edward Cebrian in favor of John Barbee. (Plaintiff's Exhibit No. 3.)

But we have indisputable evidence that the new note was not and could not be delivered unless or until certain conditions had been met. These conditions were: (1) The endorsement of the new note by the payee, John S. Barbee, to *his* creditor Van Meter Terrell Feed Co., the Kentucky corporation; and (2) the confirmation of the amount and "acceptability" by Barbee and the corporation. (Plaintiff's Exhibit No. 3.)

Obviously, since both Barbee and the corporation were in Lexington, Kentucky, the new note had to be sent to Kentucky before all these conditions could be met. And until they could be met, by the express declarations of the creditor, the new note was not to be deemed an effective instrument completed by de-

livery. The conditions were met some time just prior to December 3, 1932. (Plaintiff's Exhibit No. 4.)

While the creditor might have permitted Hugh Weldon, as the payee's agent, to accept delivery of the note in his California office, unfettered with further conditions, the fact is this was not done and as we have seen, the failure to meet any one of the conditions to be performed in Kentucky would have rendered the new note a nullity. The fact that Edward Cebrian may not have known of these conditions, or the fact that his note had to be sent to Kentucky before delivery could be completed, does not alter the fact of non-delivery. His knowledge or intent could not perfect delivery in the face of his creditor's cautious refusal to accept it until the payee had endorsed it in Kentucky.

The place of contracting is the place in which the final act was done which made the promise, or promises, comprising the contract binding.

Vol. 11, *Cal. Juris.,* Second, page 44, Sec. 6.

Thus here the final acts necessary to make the note in suit effective and binding on Edward Cebrian were the verification of the amount and the endorsement of the note by Barbee.

Vol. 11, *Cal. Juris.,* Second, page 145, Sec. 61;
Dow v. Gould and Curry, S. M. Co. (1867), 31 Cal. 629 at 652.

While it is clear that under California law it is the place of *performance* which is controlling as to all questions involving the validity and construction of a

contract (Part II), even under the so-called "historic" rule Kentucky law must be applied because the note in suit actually became effective in Kentucky, i.e. the contract was made there.

In conclusion to the argument in support of appellee's special defenses presented in this appendix to her reply brief, we respectfully submit:

I. This action to recover upon a promissory note was barred by the four year California Statute of Limitations on May 15, 1937, seven years before the maker, Edward Cebrian, died. (Part I. Section 337(1) Code of Civil Procedure.)

There is no waiver of the statute of limitations contained in the promissory note here in suit, to prevent the operation of the California four year statute. (Part I.)

II. This action would be barred by the California "borrowing" statute of limitations (Section 361, Code of Civil Procedure) in the event the language of the promissory note can be construed to contain a permanent waiver of the statute of limitations. (Part. II.)

The promissory note was payable in the State of Kentucky and must therefore be construed and its validity determined by the laws of Kentucky. (Part II.)

III. This action is barred by the provisions of Section 338(4), Code of Civil Procedure, and neither appellant's complaint, nor her proof are sufficient to

bring her within the exception to that statute. (Part III.)

IV. Prejudicial laches on the part of appellant and her predecessors bar her cause of action. (Part IV.)

V. Appellant failed to establish title to the promissory note, and rebutted any presumption of ownership by attempting to prove a chain of title which is incomplete, especially in the face of a specific issue as to title raised by the answer. (Part V.)

VI. The promissory note was not only payable in Kentucky, it was delivered in that state, i.e. the contract was made there. Thus, it follows that even under the "historic" or "splitting up" rule (which is not the law in California, Part II), the validity of the note and its interpretation must be determined by the laws of the State of Kentucky.

Regardless, therefore, of the view this Court of Appeals may take of the conclusions reached by the trial judge on the fraud issue, we respectfully submit the special defenses urged by appellee support the judgment in her favor.

Dated, San Francisco, California,
January 3, 1956.

CHARLES D. SOOY,
Attorney for Appellee.